No. 99-161-CFX Title: Chad Weisgram, et al., Petitioners
v.
Marley Company, et al.

Docketed: July 26, 1999 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Jul 23 1999	Petition for writ of certiorari filed. (Response due August 25, 1999)
	Aug 25 1999	Brief of respondents Marley Co., et al. in opposition filed.
	Sep 8 1999	DISTRIBUTED. September 27, 1999
	Sep 28 1999	Petition GRANTED. limited to Question 2 presented by the petition. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday,November 12, 1999. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 13, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT January 18, 2000. **********
	Nov 5 1999	Writ of certiorari as to State Farm Fire & Casualty Insurance Company dismissed pursuant to Rule 46.1.
	Nov 12 1999	Joint appendix filed.
	Nov 12 1999	Brief of petitioners Chad Weisgram, et al. filed.
	Nov 12 1999	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Nov 15 1999	Record filed.
	Nov 19 1999	CIRCULATED.
	Nov 30 1999	Record filed.
	Dec 10 1999	Brief of respondents Marley Company, et al. filed.
	Dec 13 1999	Brief amicus curiae of Brunswick Corporation filed.
	Dec 13 1999	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	Dec 22 1999	Supplemental brief of respondent filed.
	Dec 30 1999	Reply brief of petitioners Chad Weisgram, et al. filed.
	Jan 18 2000	ARGUED.

Supreme Court, U.S.
FILED

No. 99- 99 161 JUL 23 1999

OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,
Petitioners,

vs.

Marley Company, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Eighth Circuit so far depart from the accepted and usual course of judicial proceedings in abrogating the *Erie* doctrine relative to the substantive rule of law pertaining to Plaintiffs' burden of proof so as to call for an exercise of this Court's supervisory power?

2. If the District Court erred in admitting the testimony of the Plaintiffs' experts and the relief to be awarded is a new trial, is the United States Court of Appeals for the Eighth Circuit's decision in conflict with its own precedent and decisions of other United States Courts of Appeal if it granted judgment as a matter of law to Marley Company after excising portions of Plaintiffs' experts' testimony?

3. Does the United States Court of Appeals for the Eighth Circuit's determination that the District Court abused its discretion in admitting the testimony of Plaintiffs' experts conflict with relevant decisions of this Court relative to the District Court's discretion in determining the reliability of expert testimony, when the District Court determined that adequate support existed to mark Plaintiffs' expert testimony as reliable?

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INTERESTED PARTIES

Petitioner/Appellee Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent.

Petitioner/Appellee State Farm Fire and Casualty Insurance Company.

Respondents/Appellants Marley Company, a Delaware Corporation and its subsidiary, Marley Electric Heating Company, a Delaware Corporation; United Dominion Industries, Inc., a Delaware Corporation.

CITATION

Weisgram v. Marley Company, 169 F.3d 514 (8th Cir. 1999), *reh'g and reh'g en banc denied,* 1999 U.S. App. LEXIS 7977 (April 26, 1999).

STATEMENT OF BASIS FOR JURISDICTION

Date of judgment /order sought to be reviewed: February 23, 1999.

Petition for rehearing and petition for rehearing en banc denied April 26, 1999.

28 U.S.C. sec. 1254 confers on this Court jurisdiction to review on a writ of certiorari the judgment in question.

STATEMENT OF THE CASE

1. Evidence of Cause & Origin of the Fatal Fire

On December 30, 1993, Bonnie Weisgram died in a fire in her town home in Fargo, North Dakota. Upon arriving to investigate the fire, Capt. Freeman, a certified fire and arson investigator, found the exterior door closed and interior door open approximately 45 degrees. Fire was burning on the south (left) side of the front door (the Marley heater was located behind this door). No other visible fire was observed. A hole approximately two feet long was found under the Marley heater.

The entryway and sectional couch located on the upper level of the town home contained fire damage. No evidence of flaming combustion in the polyurethane couch cushions was found. No deep charring was found on the floor underneath the couch which would indicate flaming combustion. Freeman

found no evidence of damage to the ceiling above the couch, and, therefore no evidence of a flaming fire in the couch. Further, a piano located 1-1/2 feet from the couch was in good condition after the fire.

Freeman examined the entryway and observed deep charring along the south wall where the Marley heater was located. The hole in the floor was clear evidence that the fire burned most intensely and longest under the Marley heater. Captain Freeman observed significant damage to the ceiling above the entryway, directly over the hole in the floor. Freeman also observed heavy heat damage and discoloration on the bottom of the Marley heater. Freeman concluded that the fire started at the Marley heater.

Freeman also concluded that a rug covered a portion of the Marley heater while it was running, causing the vinyl floor to become very hot. Several witnesses testified that there was a "big throw rug" in the entryway prior to the fire that would sometimes catch and get pushed toward the Marley heater when the interior door was opened. Freeman believed the adhesive underneath the vinyl floor began to overheat and "off-gas" (vent) underneath the heater.

A remnant of a burned rug was found adjacent to the hole in the floor and was tested for accelerants. None were found. Freeman believed the open front door caused the rug to be pushed onto – and partially cover – the Marley heater prior to the fire, and off-gassing of the adhesive underneath the vinyl floor ignited the rug and other combustibles in the entryway.

Freeman found no evidence to support the possibility that the fire started in the couch by a cigarette. Marley's expert, on the other hand, testified that a smoldering middle cushion was placed behind the interior door and in front of the Marley heater by the decedent – Marley's only explanation for the hole in the floor and the cause of the fire. Marley's

expert admitted, however, that there was no evidence of a couch cushion in the entryway after the fire. Freeman testified that the middle cushion was still located on the couch when he investigated the fatal fire. He personally observed the cushion to be on the couch.

Ralph Dolence, a qualified professional fire investigator and expert for the Plaintiffs, received the Marley heater from the Fargo Fire Department and was provided with a set of photographs taken by Capt. Freeman. Dolence and Freeman also talked about the fire for over an hour. They talked about every possible source of the fire to narrow the focus of the investigation.

Dolence then examined the Marley heater and observed heavy damage an discoloration as a result of the fire. Dolence also examined the remnants of the heater's aluminum fins and found that approximately one-third of the fins survived the fire virtually unscathed. This demonstrated that a portion of the heater was uncovered when the fire began, because the heat from the fins was allowed to escape. The melted aluminum fins indicated that the heat underneath the covered portion was not allowed to escape and, instead, was reflected back into the heater.

After reviewing the physical evidence, Dolence concluded that the entryway rug was pushed onto the Marley heater, causing heat to be trapped in and around the heater. The Marley heater continued to produce heat until the adhesive underneath the vinyl flooring began "off-gassing." The temperature in and around the heater continued to rise until it reached the ignition temperature for the adhesive, approximately 435 degrees to 450 degrees F. Eventually, that portion of the rug covering part of the heater was consumed by the fire.

2. Evidence of Design Defect

Sandy Lazarowicz is a qualified metallurgist who testified on behalf of Plaintiffs. Lazarowicz testified that the Marley heater was defective because the silver regulating thermostat contacts contained serrations (serrations, in this case, are defined as grooves that appeared on the regulating thermostats' moveable arm contact). He also testified that the condition of the heater's aluminum fins after the fire was evidence of a blockage of the air flow.

The serrations observed and identified by Lazarowicz promoted electrical arcing and material transfer between the contact surfaces. He testified that approximately 25% of the silver on the moveable arm contact had been transferred to the stationary contact. He further testified that the regulating thermostat contacts separated after the temperature on the contact surfaces reached a point which allowed the metal to soften and "unweld."

Lazarowicz also compared the remnants of the Weisgram contacts with the exemplar contacts and found significant differences in the contact surfaces which proved the Marley contacts were welded together at the time of the fire. He testified that the regulating thermostat was defective because the contacts did not "mate" squarely which promoted electrical arcing and material transfer in one quadrant of the moveable arm contact. The uneven nature of the contact surface also caused the contacts to weld together at the time of the fire. Based upon his examination of the contacts, he concluded that the Weisgram heater started on fire because the excessive amount of electrical arcing and material transfer finally caused the contacts to weld together on the date of the fire. The heater failed to shut off.

Marley's own testing proved the design defect in the high limit control. That testing demonstrated that the high limit control did not turn off the heater until it reached dangerously high temperatures. Because of its placement behind a deflector shield at the top of the heater, the high limit control, in this case, did not sense the dangerously high temperature until after the fire started.

Marley's test results showed that a substantially similar 500-watt heater could produce sufficient heat to start a fire. In one test, the exemplar was allowed to run with the regulating thermostat and high limit control in place (normal operation). In that test, the air temperature in front of the heater reached 403 degrees before it turned off. In the same test, the aluminum fin tube which houses the heating element registered a temperature of 625 degrees F. It is important to note that the Marley heater had a regulating thermostat which is used to increase or decrease the temperature by turning a dial. It also had a high limit control designed to turn off the heater when it senses temperatures in excess of 190 degrees F.

In a second test by Marley, with the high limit control in place, the air temperature in front of the heater reached 417 degrees F before it turned off. This reading is 227 degrees F higher than the temperature that should trigger the high limit control and turn off the heater.

Capt. Freeman testified that the flash point of an oil-based adhesive used to affix vinyl flooring is approximately 140 degrees F and the ignition temperature is between 400 and 450 degrees F. Dolence similarly testified that an asphalt (oil) based adhesive is a relatively flammable material with an ignition temperature between 435 and 450 degrees F. Freeman also testified that the ignition temperature for a cellulose-based rug, similar to the rug in the Weisgram home at the time of the fatal fire, is between 375 and 520 degrees F.

3. Procedural History

Chad Weisgram, individually and on behalf of Bonnie Weisgram's heirs, commenced a lawsuit against Marley Company for the wrongful death of his mother. State Farm, which insured the Weisgram home, sued Marley to recover insurance benefits paid for the damage to the Weisgram town house and its contents, and (by assignment) benefits paid for the damage to the adjoining town house. The cases were consolidated and tried to a jury on the theory that Marley was strictly liable because the baseboard heater was defective. The jury awarded $500,000 to Chad Weisgram and the heirs of Bonnie Weisgram and $100,575.42 to State Farm. Marley's post-trial motions for judgment as a matter of law and motion for a new trial followed and were opposed by the Plaintiffs.

On September 4, 1997, Chief Judge Rodney Webb for the United States District Court for the District of North Dakota issued a Memorandum and Order denying Marley's post-trial motions. In his Memorandum and Order, Chief Judge Webb found no reason to exclude the testimony of Plaintiffs' experts and determined that adequate support existed to mark the testimony as reliable. Marley subsequently appealed. On February 23, 1999, in a 2-1 decision (Judge Bright, dissenting), the United States Court of Appeals for the Eight Circuit vacated the judgment for Plaintiffs after excising portions of Plaintiffs' experts' testimony and remanded the case to the District Court with instructions to grant Marley judgment as a matter of law. Rehearing and Rehearing En Banc was denied by the United States Court of Appeal for the Eighth Circuit on April 26, 1999.

28 U.S.C. sec. 1332 conferred jurisdiction on the District Court in the first instance. 28 U.S.C. sec. 1291 conferred

jurisdiction on the United States Court of Appeals for the Eighth Circuit.

ARGUMENT IN SUPPORT OF PETITION

I. This Court Should Exercise its Supervisory Power to Correct the Eighth Circuit's Radical Departure from the *Erie* Doctrine Relative to Plaintiffs' Burden of Proof.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the decisions of the North Dakota Supreme Court are binding on the Eighth Circuit panel majority in rendering their opinion in this case. The burden of proof is a rule of substantive law for *Erie* purposes. Therefore, North Dakota law provides the rule of decision relative to Plaintiffs' burden of proof and the federal courts must accept decisions of the North Dakota Supreme Court as definitive statements of North Dakota law. The Eighth Circuit was bound by decisions of the North Dakota Supreme Court, even if it believed the decisions unwise or incorrect. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (federal courts must "ascertain from all the available data what the state law is and apply it rather than prescribe a different rule, however superior it may appear").

Here, the Eighth Circuit panel majority neither correctly ascertained, nor correctly applied North Dakota law relative to Plaintiffs' burden of proof. The panel majority did not address the substantial circumstantial evidence of the defective condition of the Marley heater nor mention that under North Dakota law, circumstantial evidence will suffice to prove the existence of a defect.

Conclusive proof is not necessary to show the existence of a defect under North Dakota law. *Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472, 478 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979) (in products

liability action arising out of fire which was allegedly caused by malfunction or faulty design of electric wall heater, circumstantial evidence was sufficient to support imposition of strict liability on grounds of malfunction or faulty design of heater). A defect may be inferred from proof that the product did not perform as intended by the manufacturer. *Herman*, 247 N.W.2d at 478.

At trial, sufficient evidence was offered and received from which inferences in support of the Plaintiffs' theory could reasonably be drawn. The able and experienced trial judge and jury accepted and found Plaintiffs' evidence more credible. "[I]t is for the jury to say what inferences shall be drawn, and they may be guided to their conclusion by the rule as to the burden of proof. Sometimes that rule may completely determine the result of a trial." *Fort Dodge Hotel Co. v. Bartelt*, 119 F.2d 253, 259 (8th Cir. 1941).

Plaintiffs' experts' opinions on the cause and origin of the fire and the physical evidence overwhelmingly support the jury's determination that the fire causing Bonnie Jo Weisgram's death resulted from a defect in the Marley heater. This question of fact, decided by the jury upon conflicting evidence, must not be subject to re-examination by a panel majority of the United States Court of Appeals for the Eighth Circuit.

Because the panel majority effectively abrogated the *Erie* doctrine by refusing to follow decisions of the North Dakota Supreme Court relative to Plaintiffs' burden of proof, this Court should grant this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. This Court should exercise its supervisory powers to ensure that State substantive rights are not trampled upon by a two judge majority of a court of appeals attempting to usurp both the role of the jury and an able and experienced District Court.

II. The Eighth Circuit's Decision to Grant Judgment as a Matter of Law to Marley Company After Excising Plaintiffs' Experts' Testimony is Improper and Conflicts with its Prior Decisions and Decisions of Other Circuits.

The Eighth Circuit panel majority's overreaching directive to grant Marley Company judgment as a matter of law conflicts with its prior decisions and those of other Circuits. It has long been the law of the Eighth Circuit that if the District Court indeed erred in admitting the testimony of Plaintiffs' experts, the relief to be granted is a new trial, not judgment as a matter of law. *See Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973) (holding that the proper remedy for disposing of evidence erroneously admitted during the course of the trial is a new trial).

The Eighth Circuit's decision also conflicts with the decisions of other Circuits that have adopted the same rule. Four additional Circuits have held that, when deciding a motion for judgment as a matter of law, a court may not ignore evidence erroneously admitted at trial. *See, e.g., Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997) (reasoning that "[t]he record should be taken as it existed when the trial closed" and that the rule promotes certainty and fairness); *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir. 1993) (stating that if evidence is ruled inadmissible during trial, the plaintiff has the opportunity to introduce new evidence, but when evidence is ruled inadmissible in the context of a motion for JNOV [now JAML] the plaintiff is unable to remedy the situation); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir.

1992) (reasoning that it is wholly improper to ignore evidence admitted at trial when considering a motion for JNOV [now JAML] and that the evidence must be taken as it existed at the close of trial); *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985) (holding that it is impermissible for court to rule on a motion for JNOV [now JAML] by ruling at the time of its determination that certain evidence presented at trial was inadmissible); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983) (same).

In order to maintain and secure the uniformity of decisions and to resolve conflicts between the Circuits on this issue, this Court should grant the present petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

III. The Eighth Circuit Failed to Give the District Court the Deference that is the Hallmark of Abuse of Discretion Review.

Irrespective of established precedents and unequivocal mandates of this Court, the panel majority of the United States Court of Appeals for the Eighth Circuit gave no deference to the District Court and, more or less, reviewed the District Court's admission of Plaintiffs' experts' testimony de novo. *Cf. Kumho Tire Co. v. Carmichael*, 119 S.Ct. (1999); *General Elec. Co. v. Joiner*, 118 S.Ct. 512 (1997).

In this case, Chief District Court Judge Rodney Webb found no reason to exclude the testimony of Plaintiffs' experts, as each of the experts were qualified to render their opinions which were well-grounded in established methodologies. After analyzing the testimony in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the District Court found that no *Daubert* problems

were present. The District Court evaluated the underlying factual support and evidence supporting the experts' bottom-line opinions and determined that adequate support existed to mark the testimony as reliable. The Eighth Circuit's standard of review was improper and their decision goes too far, making a critical error in analyzing reliability by impermissibly assessing plaintiffs' experts' credibility – the province of the jury. A proper application of the correct standard of review in this case indicates that the District Court did not abuse its discretion.

District Court judges, unlike appellate judges, have a broad array of tools which can be brought to bear on the evaluation of expert testimony. Because of this special vantage point, it is quite odd and contrary to law for the Eighth Circuit panel majority to substitute its interpretation of the evidence for that of the District Court.

The Eighth Circuit's position is in conflict with decisions of this Court. If allowed to stand, the discretion of District Courts within the Eighth Circuit will be effectively subverted relative to evidentiary rulings of a similar nature. Accordingly, this Court should grant the requested petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

CONCLUSION

For the reasons stated above, Petitioners Chad Weisgram and State Farm respectfully request that the Court grant their petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 97-3735

Chad Weisgram, individually and on behalf Of the heirs of Bonnie Jo Weisgram, decedent,

Appellee,

v.

Marley Company, a Delaware Corporation and Its subsidiary, Marley Electric Heating Company, A Delaware Corporation; United Dominion Industries, Inc., A Delaware Corporation,

Appellants.

Appeal from the United States District Court for The District of North Dakota

---

State Farm Fire & Casualty
Insurance Company,

Appellee,

v.

Marley Company, a Delaware
Corporation; Marley Electric
Heating Company, a Delaware
Corporation; United
Dominion Industries, Inc., A
Delaware Corporation,

Appellants.

Submitted: November 16, 1998
Filed: February 23, 1999

Before BOWMAN, Chief Judge, BRIGHT, and MAGILL, Circuit Judges

BOWMAN, Chief Judge.

Marley Company appeals from the judgment of the District Court, entered upon a jury verdict, awarding damages to Chad Weisgram, individually and on behalf of the heirs of Bonnie Weisgram, and to State Farm Fire and Casualty Company. We vacate the judgment and remand for entry of judgment as a matter of law in favor of Marley.

I.

On December 30, 1993, at approximately 6:00 a.m., firefighters were called to the town house of Bonnie Weisgram in Fargo, North Dakota, when an off-duty firefighter noticed flames around the front entrance to the home. The front door of the residence was open (although the storm door was closed), notwithstanding the sub-freezing outdoor temperature. Firefighters entered the town house and found Bonnie Weisgram's body lying face down on top of a large, broken mirror, in the upstairs bathroom of the split-entry residence. They also found an open window in Weisgrams's upstairs bedroom, which adjoined the bathroom where the body was found. The cover of the smoke detector located in the ceiling of the upstairs hallway had been removed and was found on the carpeted floor of Weisgram's bedroom, where it had been laying since before the fire produced the soot that covered the exposed areas of carpeting. A folding chair was on the floor, folded up, near the detector cover. Upstairs in the living room, an L-shaped sectional sofa was badly damaged by fire in both sections. The back of one section of the sofa was along a metal railing that was open to the entryway and immediately to the right (north) of the entrance at about shoulder level when standing in the entryway; the other section, equally damaged, was along the adjoining (east) wall upstairs. To the left of the entrance, directly in front of the south entryway wall, there was a hole burned through the floor of the entryway. A fifteen-year-old baseboard heater manufactured by Marley had been mounted on that south wall before the fire. There was structural fire damage around the entrance of the town house. The remainder of the residence, including the area downstairs from the entryway, suffered damage from smoke, heat, and water, but no fire damage.

An autopsy determined that Weisgram had died from smoke inhalation, that is, carbon monoxide poisoning, at approximately 2:30 in the morning. There is no dispute that the likely source of the carbon monoxide was the smoldering sofa. Further, Weisgram's blood alcohol level was 0.15, and there was evidence that she had taken a drug that generally is prescribed to relieve pain and as a sleep aid, although it was not clear from the tests whether she took it that night. She was last seen alive at 11:00 p.m. the evening of December 29 by her fiance', who observed her drink an alcoholic beverage and smoke a cigarette before he left.

Weisgram's adult son, Chad[1], individually and on behalf of Bonnie Weisgram's heirs, sued Marley for the wrongful death of his mother. State Farm, which insured the Weisgram home, sued Marley to recover insurance benefits paid for the damage to the Weisgram town house and its contents, and (by assignment) benefits paid for the damage to the adjoining Ferguson town house. The cases were consolidated and tried to a jury on a theory that Marley was strictly liable because the baseboard heater was defective. The jury awarded $500,000 to Chad and the heirs and $100,575.42 to State Farm. Marley's motion for judgment as a matter of law (JAML) and its motion for a new trial both were denied. Marley appeals.

II.

We review de novo the District Court's decision to deny Marley's motion for JAML. See Finley v. River N. Records, Inc., 148 F.3d 913, 917 (8th Cir. 1998). We view the evidence

[1] Chad was not at home the night of the fire. Bonnie Weisgram had another adult son, Ryan, who was not living in the home at the time of the fire.

in the light most favorable to Chad Weisgram and State Farm, and will not reverse the court's decision unless all of the evidence properly admitted "points [Marley's] way and is susceptible of no reasonable inferences sustaining [Weisgram and State Farm's] position." Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1106 (8th Cir. 1996).

We initially consider the plaintiffs' burden of proof in this strict liability case. In order to prevail under North Dakota law, the plaintiffs were required to prove by a preponderance of the evidence that the heater "was defective in design or manufacture; the defect rendered the product unreasonably dangerous to the consumer; the defect existed when the product left the manufacturer; and the defect was a proximate cause of the [plaintiffs'] injuries." Endresen v. Scheels Hardware & Sports Shop, Inc., 560 N.W.2d 225, 229 (N.D. 1997); see also N.D. Cent. Code § 28-01.3-06 (Supp. 1997) ("No product may be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.") After hearing oral argument, it is not entirely clear to us whether the plaintiffs are allegingthat the heater had a design defect, a manufacturing defect, or possibly no defect at all. In any case, however, we hold that JAML should have been granted for Marley.[2] The District Court abused its discretion

[2] We reject any contention that we are required to remand for a new trial because our failure to do so would deny the plaintiffs the opportunity to reopen discovery and identify additional witnesses who might testify to their theory of liability. Although Federal Rule of Civil Procedure 50(d) certainly gives this Court the discretion to remand for a new trial, we can discern no reason to give the plaintiffs a second chance to make out a case of strict liability. See Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1108 (8th Cir. 1996) (reversing denial of JAML because improper expert testimony was admitted by the district court); see also Peitzmeier v.

in allowing certain opinion testimony at trial. Once that testimony is removed from consideration, the evidence properly admitted is insufficient to prove by a preponderance that the heater was defective at the time Marley sold it, much less that any purported defect rendered the heater unreasonably dangerous and proximately caused the fire that resulted in the tragic death of Bonnie Weisgram and the damage to her home. See McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1400 (8th Cir. 1994) ("A motion for [JAML] presents a legal question to the district court and to this court on review: 'whether there is sufficient evidence to support a jury verdict.'") (citation to quoted case omitted). Thus Marley is entitled to judgment as a matter of law on plaintiffs' claims.

III.

We first examine the challenged testimony. Under Federal Rule of Evidence 702, "a witness qualified as an expert by knowledge, skill, experience, training, or education" may give opinion testimony if, and to the extent, "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." It is the role of the district court to make certain that testimony admitted under Rule 702 "is not only relevant, but reliable." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993); see also Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306, 309 (8th Cir. 1997).[3] As we explain below, portions of the testimony from three of the plaintiffs' witnesses were unreliable, and the District Court abused its admittedly broad discretion in allowing the suspect testimony. See Peterson v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995) (standard of review). Further, we can say that the errors were not harmless, as they had "'substantial influence' on the jury's verdict." Id. (quoting McKnight, 36 F.3d at 1405).

Hennessey Indus., Inc., 97 F.3d 293, 296 (8th Cir. 1996) (affirming district court's decision to grant summary judgment on the grounds that certain expert testimony was inadmissible "and that based on the admissible, undisputed evidence [defendant manufacturer] was entitled to judgment as a matter of law"), cert. denied, 117 S.Ct. 1552 (1997). This is not a close case. The plaintiffs had a fair opportunity to prove their claim and they failed to do so.

A.

We begin with the testimony of Dan Freeman, the Fargo fire captain who arrived with the first fire truck on the scene of the fire at the Weisgram home. He also was the firefighter who did the investigation for the Fargo fire department. Freeman testified that he had considered whether careless smoking might have started the fire in the sofa, but he rejected that possibility because he saw no smoking materials in the

[3] Now pending before the Supreme Court is the case of Kumho Tire Co. v. Carmichael, No. 97-1709 (argued Dec. 7, 1998), which raises the question whether *all* expert testimony admitted pursuant to Rule 702 is subject to review under the four reliability factors set forth in Daubert, or whether it is only "scientific" testimony to which the test applies. Cf. Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1297 (8th Cir. 1997) (noting that "[t]here is some question as to whether the Daubert analysis should by applied at all to 'soft' sciences such as psychology") cert. denied, 118 S. Ct. 2370 (1998). We need not get into that thicket ourselves, as the testimony at issue here should have been excluded under Rule 702 as unreliable whether or not the four Daubert factors are considered. Although the Daubert Court had before it only the question of the admissibility of scientific testimony, see 509 U.S. at 590 n.8, the general principles of reliability and relevance for which we cite Daubert obviously apply to all Rule 702 expert testimony, regardless of subject matter.

home and because he did not think the burn pattern in the sofa indicated that the fire began as the result of careless smoking.[4] He opined that the fire started in the area of the baseboard heater and that "radiated heat...ignited the material on the backside of that couch." Trial Tr. Of May 20, 1997 (testimony of Dan E. Freeman), at 34. The sofa was six to eight feet away from the heater at shoulder height and shielded at least partially from any radiated heat or flame by the open front door, which was constructed of insulated steel. The witness then was allowed to testify, over objection, that the fire started because "we had a malfunction of the heater." Id. at 63. Notwithstanding Freeman's admission that he was "not an electrical expert" and that he did not "know what happened with the heater," he nevertheless was allowed to testify that he "believe[d] that we had a runaway of that heater." Id. at 64. Although Freeman clearly was qualified as a fire cause and origin expert, there is no question that he was not qualified to offer an opinion that the Weisgram heater malfunctioned and he should not have been permitted to do so.

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[4] The testimony of Marley's witnesses advanced this scenario for the cause and origin of the fire: At some time that night, Bonnie Weisgram dropped a lighted cigarette behind a cushion of the sofa, which eventually started a smoldering fire. The smoke detector activated, and Weisgram disabled it. Believing she had doused the fire in the couch, she removed the sofa cushion to the entryway. At some point, she opened the bedroom window and the front door to clear the house of smoke. The cushion and the sofa continued to smolder, producing the smoke and the carbon monoxide that eventually killed Weisgram. Under the influence of the alcohol she had consumed and the sleeping aid she had taken, she was unaware that the fires continued to burn until it was too late. The smoldering cushion in the entryway slowly burned through the floor and eventually caused the flaming fire around the entrance that was spotted at 6:00 a.m.

We need not-and do not-adopt Marley's version of events in order to conclude that JAML should have been granted to Marley.

Moreover, Freeman's testimony regarding the events that followed the surmised "runaway" amounted to nothing more than blatant speculation:

> I believe that we ignited nearby combustibles, namely, the, possibly the throw rug or area rug that was on that vinyl floor was very possibly pushed up against that heater...That up against the heater would contain the heat, would trap it, would cause it to build up to the point where you could have had ignition of that cellulose based product [the jute backing on the rug]....In addition to that, the heat build up would start to cause other things to start what we call off gassing. The vinyl floor is going to warm up, the vinyl floor is stuck to the floor with a glue, a plastic. There are several types on the market but one of them there is an asphalt base type. There is another type...ones I have looked into have got products in them that will off gas and ignite such as a naphtha, ethylene glycol...It's a solvent. Basically it's an accelerant. It will off gas and it will cause vapors to disperse. It will loosen up. Those vapors are going to try to find a way to escape from underneath that vinyl. Normally that would be at the edge of the wall where the vinyl floor meets the wall. I believe the ignition temperature of naphtha is probably somewhere in the neighborhood of 400, 450 degrees. The flash point is considerably lower than that...[B]y flash point I mean it will give off enough vapors to ignite briefly if there is a heat source to ignite.

Id. at 64, 665-66. Now, as a qualified expert in fire investigation, Freeman was free to testify-as he did-that the burn and smoke patterns and other physical evidence indicated that, in his opinion, the fire started in the entryway and radiated to the sofa. Freeman's further testimony, however, was patent speculation, as there was no evidence in the record regarding the location of the throw rug when the fire started, the type of vinyl linoleum on the floor, the glue used some fifteen years prior to secure the vinyl to the underflooring, or the flammability of the vinyl or the glue.[5] While Freeman was qualified to testify that he thought the fire originated in the area of the baseboard heater, we think the court abused its discretion when it permitted Freeman to "run away" with his own unsubstantiated theories: that the throw rug somehow blocked the heater, that the rug then ignited, that the heater transferred sufficient heat to the floor so that the adhesive under the vinyl flooring (and adhesive whose composition and other characteristics are unknown) "off gassed," and that the heater radiated enough heat so that those vapors—whatever they were—ignited. Freeman's qualification as a fire investigator did not give him free rein to speculate before the jury as to the cause of the fire by relying

[5] As the individual assigned to investigate the Weisgram fire, Freeman would have been responsible for taking samples of these items for analysis. Nevertheless, he sought only samples of the burned rug from the area around the burn-through in the floor in the entryway (and Freeman had another firefighter retrieve those samples after Freeman left the scene). Freeman had these samples tested for composition and to see whether there was an accelerant present. The only other evidence gathering Freeman did was to take some photographs and to retrieve the burned baseboard heater. It is clear from his testimony that from the very beginning Freeman thought the baseboard heater caused the fire, see, e.g., Trial Tr. of May 20, 1997 (testimony of Dan E. Freeman), at 77-78, 81, which probably explains the limited evidence he collected. State Farm, which also was early on the scene, did not gather any evidence either, as far as we can tell from the record.

on inferences that have absolutely no record support. No foundation was established for Freeman to testify to the extent he did, and the court abused its discretion in allowing the jury to hear this testimony.

B.

Marley also challenges the reliability of the testimony of Ralph Dolence. Within days after the fire, Freeman told Dolence "that we had a fire that appears to have originated in and around an electric baseboard heater" and sent him the remains of the baseboard heater. Id. at 81. Dolence testified as a "fire investigator" and "technical forensic expert." Trial Tr. of May 21, 1997 (testimony of Ralph Dolence), at 4. As a master electrician in Ohio, he also had experience consulting on electrical fires, although that is irrelevant in this case as there is no contention that the Weisgram fire was electrical. He denied being an "expert electrician" but testified that he was "an electrical expert in electrical things." Id. at 108-09.

Dolence's theory of the fire, not surprisingly, was the same as Freeman's. Dolence never went to the Weisgram town house. As he testified at trial, he drew his conclusions largely from the observations Freeman made at the scene of the fire: "Based on the examination of the heater and the physical evidence that Captain Freeman and I had discussed and the photographs which I interpret as physical evidence, the hole in the floor in my opinion was made by a couple of things." Id. at 50-51. Dolence went on to conjecture that a small rug was pushed over two-thirds of the heater, that the heat was "trapped in there and was focused down on to the... linoleum," that "volatile vapors from the adhesive come [sic] into the location of the heater," and that "[t]he ignition of those vapors is what caused this fire." Id. at 51. And

Dolence's basis for this theory? "There is no other explanation. Everything else is ruled out...by Captain Freeman." Id. at 52. Dolence did no testing to bolster this theory and admitted that he knew of no tests that anyone had conducted to support a similar theory of fire cause and origin. See id. at 171. As with Freeman's testimony, there was insufficient foundation for Dolence's testimony; the ostensibly expert opinion testimony he offered was rank speculation.

Dolence noted that the "thermostat or other components" of the heater were destroyed, "in a crumpled mass," id. at 88, and so he did not test them. He nevertheless testified that his theory of how the fire started-runaway heater, off gassing, ignition of vapors-could be true only if the thermostat (designed to shut the heater off at a comfortable room temperature set by the user) failed, followed immediately by the failure of the backup high limit control (designed to shut the heater off when it sensed a temperature of 190 degrees.) See id. at 90-92, 129. Therefore, he opined, after fifteen years of operating without incident, both the thermostat and the high limit control suddenly and simultaneously "did not function" to shut the heater off. Id. at 105. To be "fair and honest," however, Dolence was compelled to testify that he could not identify what caused the heater to run away and that he had "no idea what caused the thermostat to fail." Id. at 126; see also id. at 137, 187. He also could not determine what caused the high limit control to fail. See id. at 138, 187. Finally, he agreed with the proposition that there were no design defects in the heater, in part because, during testing, he could not create a similar overheating episode in the undamaged exemplar Marley heater that had been retrieved after the fire from the adjoining Ferguson town house. See id. at 139, 143. He thought there was the possibility of a

manufacturing defect in the Weisgram heater, but he had been unable to identify one. See id. at 145-46, 148. Upon examining the contacts[6] of both the thermostat and the high limit control of the Weisgram heater, Dolence testified, "I was bothered by the condition of things I saw on some of this evidence." Id. at 100. Therefore he sought the assistance of a metallurgist, but Dolence could offer no opinion of his own about the contacts or what may have caused the presumed failure of the thermostat and the high limit control. See id. at 101.

In these circumstances, the District Court abused its discretion by permitting Dolence to testify as an expert witness regarding matter about which he could only speculate. As with Freeman's testimony, there is no reasonable factual basis for Dolence's opinions. Dolence's own testimony attests to the fact that he was offering nothing more than pure conjecture as to whether or not the Weisgram heater was defective. The testimony therefore was unreliable under Rule 702 and should have been excluded.

C.

The metallurgist Dolence contacted was Sandy Lazarowicx. Dolence told Lazarowicz his theory of the fire and asked him to take a look at the Weisgram heater. Lazarowicz examined the thermostat contacts and the high limit control contacts from the heater and studied the same components in the Ferguson heater. He was qualified as an expert in the properties of metals. Admittedly, however, he was not an expert in fire cause and origin, in baseboard heater

[6] When the contacts are closed, that is, touching, the circuit is complete and current flows through the appliance. The circuit is broken-current through the unit is cut-when the contacts are separated, or open.

operation, or in the design or testing of contacts in such a unit. See Trial T. of May 27, 1997 (testimony of Sandy Lazarowicz), at 16-17, 64.

He testified that the thermostat contacts were defectively designed because they were serrated. The rough surfaces caused arcing and material transfer between the contacts. He theorized that "the continual usage and build up of defects on the surface" of the contacts must have caused them to weld, and that they could not then pull apart (at least not until the heat from the fire in the home softened the weld). Id. at 81. Thus, he said, there was a closed circuit, the heater did not shut off, and that is why the unit overheated. He formulated his theory knowing practically nothing about the Weisgram heater, or any other baseboard heater for that matter. For example, when he formed his opinions he was unaware of the heater's wattage or the amperage it drew, and therefore could not say if the thermostat contacts could have reached a high enough temperature to melt the metal and to form a weld *before* the fire. See id. at 69-71, 73. He performed no tests to determine whether it was even theoretically possible that the contacts could get sufficiently hot to weld during operation of the heater. In fact, in his first deposition, Lazarowicz was unable to say for certain that the contacts actually had welded, notwithstanding his examination of them under an electron microscope. Only after closer examination of the contacts from the Ferguson exemplar was he able to see the evidence of welding in the Weisgram contacts. We think the District Court abused its discretion when it permitted this testimony from Lazarowicz.

Further, as we have explained, the heater had a backup system that would prevent it from dangerously overheating even if the heater ran amok because the thermostat failed to shut it off: the high limit control. In order for the heater to be

defective in the way the plaintiffs theorize, the high limit control had to fail to shut off the electrical current to the heater at the very same time that the thermostat was failing. Lazarowicz testified that the high limit contacts did not open when the unit was energized (receiving current), but opened only after the fire was well underway. He theorized that this failure may have occurred because the high limit control's temperature sensing mechanism was placed within the unit in a location where it could not detect the actual temperature of the heater.[7] He had metallurgic evidence for the opinion that the contacts did not open while electricity was flowing through the heater (and, in fact, other witnesses noted the same evidence). But he had no metallurgic reason for his conclusion that the device was not properly sensing the temperature, because, of course, that is not a metallurgic issue. Lazarowicz testified that he had performed no tests on the Ferguson exemplar to see if its high limit switch functioned properly, or to determine if in fact there was a defect (in design) in that similar heater. He did not have the necessary experience-either from his work as a metallurgist or from tests performed in connection with this case-to be qualified as an expert who could testify that the high limit control failed because it was defectively designed or manufactured.

Lazarowicz's opinions amount to no more than "subjective belief or unsupported speculation." Daubert, 509 U.S. at 590. We conclude that the nexus between his observations of the contacts and his conclusion that the heater was defective is not scientifically sound. He admittedly had

[7] At oral argument, counsel for plaintiffs said the high limit control was not defective and did not fail, but simply did not shut off the heater when it should have. It is not clear to us, then, what the plaintiffs' theory of liability now is. We continue with our analysis, however, under the theory submitted to the jury: strict products liability because of a design or manufacturing defect.

very limited experience with electrical contacts in small appliances and no experience with how contacts function in baseboard heaters. "[T]here is simply too great an analytical gap between the data and the opinion proffered." General Elec. Co. v. Joiner, 118 S.Ct. 512, 519 (1997). Therefore, his testimony was unreliable and it was an abuse of discretion to allow it.

D.

We have read very carefully the entire transcript of the trial in this case. Freeman, Dolence, and Lazarowicz were the plaintiffs' only witnesses to testify to the theory of liability on which this case was based: that the baseboard heater was defective in design or manufacture.[8] Neither Freeman nor Dolence were qualified under Rule 702 to testify that the heater was defective, and it was an abuse of the District Court's discretion to allow their testimony to that effect (not to mention their rampant speculation about how the "runaway" heater then might have ignited the fire). Further, Lazarowicz's testimony about the defective thermostat contacts and the placement of the high limit control also was not sufficiently reliable under Rule 702 to have been admitted in evidence. Because these witnesses offered the only evidence of defect, their testimony obviously had a substantial influence on the jury's decision to find Marley strictly liable

[8] Dolence testified that the heater was *not* defectively designed, but that it may have had a manufacturing defect that he simply could not identify. Lazarowicz testified that the defects *were* in the design of the heater—the serrated contacts on the thermostat and the placement of the high limit control sensor—but he also said there was *no* design defect in the high limit control. These contradictions from the plaintiffs' own witnesses are yet another indication that the jury reached a finding that the heater was defective only by engaging in speculation.

for damages. Bonnie Weisgram's death in this fire was a tragedy and the damage to the town houses was unfortunate. But if the heater cannot be proven to have been defective when Marley sold it, then under North Dakota law of strict products liability the plaintiffs cannot prevail-even assuming Freeman and Dolence are correct about the off gassing adhesive and the rest of their theory relating to the cause of the fire. Without the testimony at issue, the jury's verdict cannot stand.

IV.

Marley raises a number of other issues, all of which it is unnecessary for us to address in order to resolve the appeal.

The plaintiffs' motion for relief under Federal Rule of Appellate Procedure 38 for certain arguments advanced by Marley on appeal (arguments we do not address) is denied.

V.

The judgment for the plaintiffs is vacated and the case is remanded to the District Court with instructions to grant Marley judgment as a matter of law.

BRIGHT, Circuit Judge, dissenting.

I dissent. I would deny Marley's motions for a new trial and judgment as a matter of law. The jury verdict has adequate support from properly admitted expert testimony. The plaintiffs' theory of the case relied on the testimony of two properly qualified fire investigators and a properly qualified metallurgist. This testimony provided evidence that the fire originated with the heater and that defects in the thermostat contacts and the placement of the high limit control contributed to the fire. The experts arrived at their conclusions by personally inspecting the evidence from the fire scene using accepted investigative techniques. Although each expert may have testified on matters outside his particular area of expertise, these matters went to the weight and not the admissibility of the testimony. Moreover, the experts' experience lent support to this testimony.

Fire cases differ from most accident cases because fires tend to destroy evidence of causation. As a result, theories about the cause of fires inevitably rest on circumstantial evidence. Arson and insurance cases, as well as product liability cases like this one, require expert evaluations to determine the cause of fires. The courts traditionally permit qualified fire investigators to express opinions on the cause of fires.

For example, in Talkington v. Atria Reclamelucifers Fabrieken BV (Cricket BV), 152 F.3d 254 (4th Cir. 1998), a

product liability case, the court affirmed a jury verdict for the plaintiffs which rested on the testimony of two fire investigators. The fire investigators discovered the body of a child in close proximity to a cigarette lighter and a sofa. See id. at 260. They also conducted a test in which they compared the sofa to a sofa ignited with a cigarette and an open flame. See id. at 265. At trial, the investigators testified that the fire occurred because the child ignited the sofa with the cigarette lighter. See id. at 264-65. The court upheld the admission of this testimony. The experts qualified as fire investigators and gave reasoned explanations for rejecting alternative explanations, including the defense theory that a cigarette started the fire. See id. at 264-66.

Similarly, in Marshall v. Humble Oil & Refining Co., 459 F.2s 355 (8th Cir. 1972), this court affirmed a jury verdict finding the defendants liable for an explosion in a poorly ventilated gas station storeroom. The plaintiffs contended that the explosion occurred when a spark from an air compressor switch ignited accumulated gas vapors. See id. at 357-58. This theory rested on the discovery of soot in the storeroom after the fire, testimony that the storeroom door was found closed immediately after the explosion, and the fact of the explosion itself. See id. at 358-60. This court held that the plaintiffs presented sufficient evidence of causation even though the compressor switch itself showed no fire damage. See id. at 359-60.

In this case, the jury was required to determine the cause of the fire that killed Bonnie Weisgram in her home. Plaintiffs Weisgram and State Farm argued that a defect in the baseboard heater caused the fire. The court must determine whether the plaintiffs presented reliable evidence of their theory by

experts who possessed the necessary qualifications.[9] Under Rule 702, a witness can testify as an expert if his knowledge qualifies him to offer an opinion that will assist the trier of fact in arriving at the truth. See Fed. R. Evid. 702; Pelster v. Ray, 987 F.2d 514, 526 (8th Cir. 1993). Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony. See Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1298 (8th Cir. 1997). The rule "'is one of admissibility rather than exclusion.'" Id. (quoting Arcoren v. United States, 929 F.2d 1235, 1239 (8th Cir. 1991)). We review district court decisions on the qualifications and reliability of experts for an abuse of discretion. See General Elec. Co. v. Joiner, 118 S. Ct. 512, 517 (1997). With this standard in mind, I review the district court's decision to admit the testimony of the plaintiffs' experts.

The plaintiffs first called Captain Dan Freeman of the Fargo Fire Department. Freeman was the first person to arrive at the fire scene. Freeman testified as a fact witness and to some extent as an expert. Freeman testified that the fire originated in the entryway. Upon arrival, he saw a fire burning on the south side of the entryway. He saw no other fire in the house. After searching for survivors and removing Bonnie Weisgram's body, Freeman began to investigate the cause of the fire. He first considered the sofa as a source of

[9] In answering that question in the negative, the majority cites Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) for support but also recognizes that the Daubert analysis for the admission of expert scientific testimony may not apply to non-scientific testimony. Maj. Op. at 6 n.3. As the majority has noted, Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom., Kumho Tire Co. v. Carmichael, 118 S. Ct. 2339 (1998), now before the Supreme Court, raises the issue whether the factors enunciated in Daubert for the admissibility of scientific evidence also apply to non-scientific evidence.

the fire, but discarded that possibility when he inspected the sofa and the surrounding area. The sofa exhibited signs of smoldering combustion but not flaming combustion. Freeman saw no charring on the floor beneath the sofa or damage to the ceiling above the sofa. Furthermore, a piano located within 1 1/2 feet of the sofa remained in good condition. As Freeman continued to investigate, he determined that the fire originated in the entryway and spread to the sofa. The sofa suffered the most damage on its backside, which was exposed to the entryway, and there was charring on the woodwork inches from the backside of the sofa. Freeman testified that a fire strong enough to char the woodwork could have ignited the sofa. Freeman also saw evidence of flaming combustion in the entryway. A two-foot long hole had been burned through the floor underneath the heater and the ceiling above the heater had suffered significant damage.

The plaintiffs next called Ralph Dolence, a professional fire investigator, to testify as an expert witness. Dolence listened to Freeman's description of the fire scene and inspected the heater and photographs of the fire scene. Dolence testified that the fire originated with the heater. In his opinion, a throw rug pushed up against the heater caused heat to accumulate in and around the heater.[10] The excess heat caused the glue on the vinyl flooring beneath the heater to vaporize and ignite. The fire spread to the walls and ceiling in the entryway and eventually to the sofa in the living room. To support his conclusions, Dolence testified that burn patterns on the heater indicated that it had been partially covered during the fire and that it had been exposed to extreme heat underneath. Dolence also testified that asphalt-based

[10] Three frequent visitors to the Weisgram home testified that no entryway throw rug would frequently get pushed up against the heater by the movement of the entryway door.

glue used in vinyl flooring has an ignition temperature of approximately 450 degrees. Dolence's testing of the exemplar heater demonstrated that the heater could reach a temperature of 750 degrees.

As their third expert, the plaintiffs called Sandy Lazarowicz, a metallurgist. Lazarowicz had performed failure analysis on the thermostat contacts and had inspected the high limit control. Lazarowicz's testimony provided evidence of defects in the thermostat contact and the placement of the high limit control that resulted in their failure to shut down the heater at the time of the fire. He testified that serrations on the contact surfaces and mismatching of the contacts caused electrical arcing and material transfer, which in turn caused the contacts to weld.[11] Lazarowicz also testified that the high limit control did not detect the heat build-up before the fire because it was placed behind a deflector shield.

Freeman and Dolence possessed ample qualifications to testify as experts on the cause of the fire. Freeman was a certified fire investigator and had investigated over 100 fires in addition to completing 400 hours of training in fire and arson investigation. Dolence had been investigating fires for over fifteen years and had directed fire investigation units in two municipalities. While neither Freeman nor Dolence had worked with the type of heater found in the Weisgram home, they both had experience investigating fires caused by heaters and other electrical appliances. Thus, in my view they were qualified to offer opinions on whether the heater caused the

[11] Defense experts Michael Phy, Richard Moore, and Vincent Acampora testified that the thermostat contacts showed evidence of electrical arcing and material transfer. Dolence testified that he observed serrations on the surface of the contacts, something he had never seen before even though he had inspected thousands of contacts. Marley's own witness, Richard Moore, likewise testified that he had seen over 1,000 contacts, none with serrations.

Weisgram fire. Dolence possesses particularly relevant qualifications. He is a master electrician who has investigated a number of electrical fires and has written a book on the subject. He was well-qualified to give his opinion that a malfunction in the electrical components of the heater caused the fire. The district court did not abuse its discretion in permitting Freeman and Dolence to testify.

Lazarowicz also possessed sufficient qualifications to testify about defects in the thermostat contact and high limits control. While Lazarowicz may not have been a speciliaist in heaters per se, he was a metallurgical engineer and had inspected defective electrical contacts for years as part of his employment. These qualifications made him competent to testify about the post-fire condition of the thermostat contacts and high limit control, which were in essence electrical contacts. The district court did not abuse its discretion in permitting him to testify.

Moreover, even if the plaintiffs' experts lacked specific expertise in heater, this matter went to the weight and not the admissibility of their testimony. See Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc., 125 F.3d 1176, 1183 (8th Cir. 1997) ("[T]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.") (quoting Hose v. Chicago Northwester Transp. Co., 47 F.3d 277, 283 (8th Cir. 1995) ("Once the trial court has determined that a witness is competent to testify as an expert, challenges to the expert's skill or knowledge go to the weight to be accorded the expert testimony rather than to its admissibility.") (quoting Fox v. Dannenberg, 906 F.2d 1253, 1256 (8th cir. 1990)); Williams v. Pro-Tec, Inc., 908 F.2d 345, 348 (8th Cir. 1990) (holding that an expert's self-acknowledged lack of medical expertise went

to the weight rather that to the admissibility of his testimony).

The majority opinion views the testimony of the plaintiffs' experts as unreliable. Certainly expert testimony must be reliable. See Maj. Op. At 5,6. Reliability in the context of this case and under Rule 702 relates to the qualification of the experts, the foundation for their opinions, and their helpfulness to the jury. An expert's opinion should be excluded if it is fundamentally unsupported so that it can offer no assistance to the jury. See Arkwright, 125 F.3d at 1183. The plaintiffs' experts based their opinions on personal inspection of the evidence and applying knowledge acquired from training and experience. Their opinions rested on factual support. The district court did not abuse its discretion in determining that their opinions were reliable and could be considered by the jury.

Lazarowicz personally inspected the thermostat contacts and the high limit control. He saw that the surface of the contacts was serrated and that the contacts did not properly connect. He concluded in light of his knowledge and experience that these features contributed to the fire by causing the contacts to weld at the time of the fire. He saw that the high limit control was located behind a deflector shield. He Determined, again in light of relevant training and experience, that the high limit control Had failed to shut down the heater because the deflector shield prevented it from Detecting the heat build-up. When determining whether such evidence is sufficient to support the jury's verdict, the evidence must be viewed in the light most favorable to The plaintiffs, giving them the benefit of all inferences. See Stockmen's Livestock Market, Inc. v Norwest Bank of Sioux City, 135 F.3d 1236, 1240-41 (8th Cir. 1998). Lazarowicz's observation of the contact features and the placement of the

high limit control provided enough factual support for his opinions to justify submitting the issue of a product defect to the jury.

Freeman and Dolence personally inspected the evidence from the fire scene. Their opinions about the cause of the fire did not lack factual support. The condition of the sofa and the charring in the entryway supported Freeman's and Dolence's determination that the fire originated in the entryway. The charring in the entryway and the hole in the floor supported their determination that the fire originated near the heater. Freeman discovered a partially burned throw rug near the hole. Three frequent visitors to the Weisgram home testified that a throw rug in the entryway was frequently pushed up against the heater. These facts supported the determination that the throw rug was pushed up against the heater and caused heat to build up in the heater. Freeman and Dolence knew that the throw rug and the glue used on vinyl flooring had flashpoints within the range of temperatures produced by baseboard heaters. This knowledge supported their determination that the heat build-up ignited the throw rug and the glue. Dolence knew the heater could not overheat if the thermostat and the high limit control functioned properly. This justified his determination that those parts failed to shut down the heater at the time of the fire.

The plaintiffs' theory of causation depended primarily on circumstantial evidence. However, as discussed earlier, theories of fire causation must rely heavily on circumstantial evidence. There was enough evidence here for a reasonable jury to conclude that the fire originated as Freeman and Dolence testified. The fire investigators saw no other source of heat in the entryway other than the heater and no

combustibles were found other than the throw rug and glue.[12] The district court did not err in submitting the issue of causation to the jury.

The majority errs in a second regard. See Maj. Op. at 4 n 2. If the district court Erred in admitting the testimony of the plaintiffs' experts, the relief to be awarded is a New trial, not judgment as a matter of law. In Midcontinent Broadcasting Co. v North Central Airlines, Inc., 471 F.2d 357 (8th Cir. 1973), this court held that a new trial is The proper remedy for an error in the admission of expert testimony. See id. at 360. See also Schudel v General elec. Co., 120 F.3d 991, 995 (9th Cir. 1997); Jackson v Pleasant Grove Health Care Ctr., 980 F.2d 692, 695-96 (11th Cir. 1993); Douglass v Eaton Corp., 956 F.2d 1339, 1343-44 (6th Cir.) 1992). Neither Wright v Willamette Industries, Inc., 91 F.3d 1105 (8th Cir. 1996) nor Peitzmeier v Hennessy Industries, Inc., 97 F.3d 293 (8th Cir. 1996) has overruled Midcontinent Broadcasting. The new trial question was not before the court or discussed in either of those two cases.

In sum, the parties presented two reasonable theories about the cause of the fire. The experienced and able trial judge admitted the testimony of the plaintiff's experts. He also permitted expert witnesses to testify to Marley's theory of the case. A North Dakota jury evaluated the evidence and determined that the plaintiffs should recover Damages. As a court, we are only called upon to determine whether the district court Abused it discretion in permitting the experts to testify. Had the jury rendered a Verdict for Marley, we would not be in a position to say that the district court abused Its discretion in admitting the testimony of the defense experts. This controversy Represents a typical case to be

[12] Freeman had the hole beneath the heater checked for accelerants. None were found.

decided by a jury. This court ought not overturn both The trial judge and the jury. Accordingly, I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and
On behalf of the heirs of
Bonnie Jo Weisgram, decedent,

Plaintiff,

-vs-

Marley Company, a Delaware
Corporation, and its subsidiary,
Marley Electric Heating Company,
A Delaware Corporation, and
United Dominion Industries, Inc.,
A Delaware Corporation,

Defendants.

State Farm Fire and Casualty
Insurance Company,

Plaintiffs,

-vs-

CIVIL NO. A3-95-104

Marley Company, a Delaware
Corporation, and its subsidiary,
Marley Electric Heating Company,

A Delaware Corporation, and
United Dominion Industries, Inc.,
A Delaware Corporation,

Defendants.

MEMORANDUM AND ORDER

This action was tried to a jury, which returned a verdict in favor of the plaintiffs. Before the court is defendant Marley's motion for judgement as a matter of law, pursuant to Rule 50 of the Federal Rules of Civil Procedure, and motion for a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure (docket #76). The motions are opposed by the plaintiffs.

JUDGEMENT AS A MATTER OF LAW

The defendant brings a post-trial motion for judgement as a matter of law arguing that the evidence presented at trial does not support the jury verdict. In essence, defendant argues that the plaintiffs failed to establish that the electric baseboard heater manufactured by defendant was defective in any way. Plaintiffs disagree, arguing that the evidence clearly established that the fire in Bonnie Weisgram's home on December 30, 1993, was caused by a defective heater manufactured by defendant.

The standard on a Rule 50 motion for judgement as a matter of law is as follows:

> [T]he district court must (1) consider the evidence in the light most favorable to the prevailing party, (2)

> assume that all conflicts in the evidence were resolved in favor of the prevailing party, (3) assume as proved all facts that the prevailing party's evidence tended to prove, and (4) give the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts proved. That done, the court must then deny the motion if reasonable persons could differ as to the conclusions to be drawn from evidence.

Haynes v. Bee-Line Trucking Co., 80 F.3d 1235, 1238 (8th Cir. 1996) (citations omitted). "Such a motion should be granted [only] 'when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party.'" Vetter v. Farmland Industries, Inc., No. 96-4286, 1997 WL 394703, at *7 (8th Cir. July 16, 1997) (citations omitted). "A jury verdict is to be overturned '[o]nly when there is a complete absence of probative facts to support the conclusion reached.'" Id. It is clear from the Eighth Circuit's language that the moving party's burden is substantial in a motion for judgment as matter of law.

In this case, both parties presented alternative theories, supported by expert testimony, of the cause of the fire in the Weisgram home. In this court's opinion, the jury could have decided in favor of either party based on the facts presented at trial. However, in this court's opinion, the defendant failed to recognize the weight that the jury would give to each of the experts' opinions. Clearly, the jury found the plaintiffs' experts' opinions more credible. Therefore, because there was sufficient evidence upon which a reasonable juror could find in favor of the plaintiff, the defendant's motion for judgement as a matter of law is DENIED.

NEW TRIAL

Defendant moves for a new trial on the grounds that the weight of the evidence did not support the jury's verdict and that the court made several prejudicial errors which entitle it to a new trial. Each of the defendant's stated grounds for a new trial will be addressed in turn.

The defendant first argues for a new trial based on the sufficiency of the evidence presented during trial. The Eighth Circuit Court of Appeals has outlined the standard this court must follow when addressing motions for new trial based on the weight of evidence:

> The district court has discretion to grant or deny a New trial based on its reading of the evidence. However, the trial court cannot usurp the function of a jury. The district court can only disturb a jury Verdict to prevent a miscarriage of justice. The Verdict must be against the 'clear weight,' 'overwhelming weight,' or 'great weight,' of the evidence for a new trial to be granted.

Beckman v. Mayo Foundation, 804 F.2d 435 (8th Cir. 1986) (citations omitted); see also White v. Pence, 961 F.2d 776, 781 (8th Cir. 1992). Therefore, the court "is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." King v. Davis, 908 F.2d 1236, 1237 (8th Cir. 1992).

In this case, as noted above, it is clear that the jury's verdict for the plaintiff was not against the clear and overwhelming weight of the evidence presented. Contrary to

the defendant's arguments, the expert testimony presented at trial did not weigh heavily in its favor. Therefore, the defendant's motion for a new trial based on the weight of the evidence is DENIED.

The defendant's next argument for a new trial is that the plaintiffs' experts, namely Captain Dan Freeman, Ralph Dolence, and Sandy Lazarowicz, were not qualified to give expert testimony and that their opinions were inadmissible because they were based on improper scientific methodology. Plaintiffs disagree.

Rule 702 of the Federal Rules of Evidence permits "opinion testimony by experts when the witness is 'qualified as an expert by knowledge, skill, experience, training, or education, ' and 'if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact in issue.'" McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995) (quoting Rule 702); see also Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S Ct. 2786, (1993)). In Daubert, the Supreme Court abandoned the Frye rule, requiring general acceptance in the relevant scientific community of the techniques utilized by the expert in reaching his opinion. Daubert, 113 S.Ct. at 2794. The Supreme Court in Daubert opinioned that the Frye standard was at odds with the liberal thrust of the Federal Rules of Evidence. Id. Therefore, Daubert granted the trial court the flexibility and discretion to determine whether expert testimony was trust worthy even though the techniques may not have won general scientific acclaim. Id. At 2798.

When scientific evidence is challenged, the trial judge serves as gate keeper, ensuring that any and all scientific testimony or evidence that is to be admitted is both relevant

and reliable. See Daubert, 113 S.Ct. at 2798-99 (1993).[1] However, "[t]he exclusion of an expert's opinion is proper only if it is 'so fundamentally unsupported that it can offer no assistance to the jury.'" Wood v. Minnesota Mining and Manufacturing Co., 112 F.3d 306, 309 (8th Cir. 1997) (citing Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968, 974 (8th Cir. 1995)). The requirements of Rule 702 are liberal; if the witness meets the liberal minimum qualifications, then the level of the witness's expertise and the factual underpinnings of his testimony go to the weight, not admissibility, of the evidence. See Waitek v. Dalkon Sheild Claimants Trust, 934 F. Supp. 1068, 1086-89 n.10 (N.D. Iowa 1996); McKendall v. Crown Control Corp., No 95-56657, 1997 WL 448265, at *4 (9th Cir. August 8, 1997); Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir.), cert. denied, 117 S Ct. 611 (1996).

In this case, the court found no reason to exclude the testimony of any of the plaintiffs' experts during trial and is not convinced by defendant's arguments in the present motion. Each of the plaintiffs' experts was qualified to render the opinions given. Furthermore, each of the experts' opinions was well-grounded in established methodologies, and in this

---

[1] Defendant argues that because the court refused to hold a Rule 104 hearing and rule on the admissibility of the plaintiffs' experts' testimony prior to trial, that it failed to properly exercise its gate keeping function. The court finds this argument to be without merit. The defendant's Rule 702 motion and request for a Rule 104 hearing (docket #55) was made on Friday, May 16, 1997, and the first day of trial was Monday, May 19, 1997. Defendant's motion was tardy. Although the court refused to postpone the trial in order to hold a Rule 104 hearing, the court heard argument by both sides during the pretrial conferenceand reserved ruling on the Rule 702 motion until a ruling could be made in the context of trial. The court fully exercised its gate keeping function during the course of the trial and the lack of a Rule 104 hearing prior to trial did not prejudice the defendant in any way.

court's view, the questions raised by defendant go to weight not admissibility.[2] Defendant's arguments address the factual underpinnings of the opinions and the accuracy of the conclusions reached by each of the experts. Therefore the opinions were admissible. This court agrees with the Supreme Court's view in Daubert that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the tradition and appropriate means of

[2] First, as to Captain Dan Freeman, it is clear that no Daubert problems were present. Freeman is a fire investigator for the Fargo Fire department and gave his opinion of the cause and point of origin of the fire in the Weisgram home. Freeman has been a fireman for almost 30 years and Captain for 19 years. Freeman is a certified fire investigator and has investigated many fires. Freeman investigated the Weisgram fire while on call for the Fargo Fire Department. Freeman's testimony was based on his experience as a fire investigator and examination of the fire scene while on duty. Therefore, Freeman's testimony was clearly admissible expert opinion under Rule 702.

Second, Ralph Dolence, who also testified regarding the cause and point of origin of the Weisgram fire, was qualified to give his opinion. Dolence was a fireman for 17 years and now serves as a fire investigator consultant. Dolence has investigated thousands of fires in his career. Dolence is a master electrician and has lectured at several seminars on electrically caused fires. Although defendant criticizes Dolence because of his lack of formal education, it is clear that he is a qualified expert through experience. Furthermore, Dolence's opinion was based on his investigation of the heater from the Weisgram home and photographs of the fire scene, utilizing well-established fire investigation techniques. Clearly, Dolence's testimony meets the liberal requirements of admissibility of Rule 702.

Third, Sandy Lzarowicz, who testified that the heater was defective due to the design of the electrical contacts within the heater, also presented no Rule 702 problems. Lazarowicz is a metallurgical engineer and materials scientist, receiving his degrees from Carnegie Mellon Institute. Throughout his career Lazarowicz has conducted failure analysis on various metals and electrical switches. Lazarowicz's testimony was based on his physical examination of the Weisgram heater and an exemplar heater manufactured by the defendant, utilizing well-established metallurgical engineering methods. Clearly, Lazarowicz's testimony was admissible under Rule 702.

attacking shaky but admissible evidence." Daubert, 113 S.Ct. at 2798. In this case, defendant does not give enough credit to the ability of juries in our system of justice to weigh or weed out weak expert testimony.[3] Therefore, defendant's motion for a new trial on Rule 702 grounds is DENIED.

The defendant's next argument for a new trial is that the court erred when it refused to allow into evidence photographs of defense experts' testing. According to defendant, the photographs were highly probative and were not overly prejudicial. In this court's opinion, the photographs were unnecessarily cumulative in light of the testimony of the defense experts. The tests conducted by Richard Moore and Russel Ogle were fully described and explained to the jury and the admission of photographs would have been cumulative and prejudicial, and therefore, inadmissible pursuant to Rule 403 of the Federal Rules of Evidence. See Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985). Therefore, defendant's motion for a new trial based on the exclusion of the photographs of its experts' testing is DENIED.

The defendant's next argument for a new trial is that the court's final jury instruction number nine, regarding circumstantial proof of a defect, was erroneous and misled the

[3] In this court's opinion, the Second Circuit Court of Appeals poetically summarized the defendant's arguments in this case:

> Trial judges must exercise sound discretion as gatekeepers of expert testimony under Daubert, [Defendant]...., however, would elevate them to the role of St. Peter at the gates of heaven, performing a searching inquiry into the depth of an expert witness's soul--separating the saved from the damned. Such an inquiry would inexorably lead to evaluating witness credibility and weight of the evidence, the ageless role of the jury.

McCullock, 61 F.3d at 1045

jury, resulting in a verdict for the plaintiffs. When instructing a jury, the court has broad discretion in the language of the charge as long as the entire instruction fairly and adequately contains the applicable law. See Garnes v. Gulf & Western Mfg. Co., 789 F.2d 637, 642 (8th Cir. 1986) (citing Ferren v. Richards Mfg. Co., 733 F.2d 526, 520 (8th Cir 1984)); See also Haynes v. Bee-Line Trucking Co., 80 F.3d 1235 (8th Cir. 1996) (reviewing a district court's jury instructions for inaccuracies under the applicable state law).

In this court's opinion, the challenged instruction is an accurate statement of the law applicable to this case. See Herman v. General Irrigation Co., 247 N.W.2d 472 (N.D. 1976); Schmidt v. Plains Elec., Inc., 281 N.W.2d 794 (N.D. 1979). Defendant argues that the Herman and Schmidt cases are no longer good law in light of the North Dakota Legislature's passage of a new products liability act and the Eighth Circuit's interpretation of that act. See N.D. Cent. Code § 28-01.3-06 (Supp. 1995); Reagan v. Hi-Speed Checkweigher Co., Inc., 30 F.3d 947, 949 (8th Cir. 1994). However, in this court's opinion, neither section 28-01.3-06 nor Reagan address the issue of how a plaintiff goes about proving the existence of a defect, especially when the product was destroyed or otherwise untestable. Therefore, because the challenged instruction is accurate and relevant in light of the evidence presented at trial, the defendant's motion for a new trial on that instruction is DENIED.

The defendant's next argument for a new trial is that the court questioned defendant's expert Michael Ply improperly and prejudiced the defendant's case as a result. The court disagrees. Rule 614(b) of the Federal Rules of Evidence provides that the court may interrogate witnesses to clarify and issue, elicit facts, or comment on evidence. A judge may reflect his view of evidence as long as it is made clear that the

jury is the final decision-maker with regard to the facts. Lewy v. Remington Arms Co., 836 F.2d 1104, 1110 (8th Cir. 1988). A judge is more than a mere moderator and at times it is proper for the judge to comment on the evidence being presented. Id. However, it is vital that the judge never cross the line from his role as a judge to that of an advocate. Id.; Jaeger v. Hemingson, 714 F.2d 773, 777 (8th Cir. 1983) (noting that Judge must assume the role of an advocate and that the judge's actions must prejudice a party's right to a fair trial for judicial questioning of a witness to be reversible error.)

In this case, the court did not overstep its bounds when it questioned Phy. The court's purpose in questioning Phy was to be sure that the jury understood that what Phy was testifying to was his opinion. The transcript clearly shows that Ply was testifying in a manner that led one to believe that he was making factual assertions rather than giving his opinion. The court's inquiry ended once it was made clear to the jury that Phy's testimony was his opinion. Moreover, any prejudice that may have resulted from the court's questioning was cured by the court's instruction to the jury regarding its role as the final decision maker with regard to credibility and that anything said by the court or the attorneys was not evidence. Therefore, defendant's motion with regard to the court's questioning of Phy is DENIED.

The defendant's next argument for a new trial is that the court erred when it allowed Captain Dan Freeman to testify as to his opinion of the cause and point of origin of the fire in the Weisgram home because Freeman was not listed as an expert witness in the Final Pretrial Order (docket #52). The Court disagrees. Rule 16(e) of the Federal Rules of Civil Procedure provides that final pretrial orders "shall control the subsequent course of the action unless modified by a subsequent order." The purpose of Rule 16 is to avoid ungair

surprise at trial. See 6a Wright and Miller 2d § 1522, p. 218; Control Data Corp. Securities Litigation v. Control Data Corp., 933 F.2d 616, 621 (8th Cir. 1990); Clarksville Montgomery County School Sys. v. U.S. Gypsum Co., 925 F.2d 993, 998 (6th Cir. 1991).

In this case, the court finds the defendant's arguments that Rule 16 was violated unpersuasive for several reasons. First, the court is of the view that the defendant could not have been surprised by the testimony given by Freeman in light of the fact that he was deposed by the defendant. Second, the court agrees with plaintiffs' assertion that it is inconceivable how Freeman could have testified about his investigation of the cause of the Weisgram fire without giving his opinion of the cause. Third, it is clear that Freeman was a qualified expert in the filed of fire investigation based upon his experience and training. Fourth, Freeman testified as a representative of the Fargo Fire Department and was not paid for his services by plaintiffs, and therefore, Rule 26 did not require plaintiffs to disclose Freeman as an expert witness. The fifth and final reason is that the court has not found any indication of the plaintiffs using sleight of hand to get Freeman's expert testimony into evidence. Therefore, defendant's motion for a new trial based on a Rule 16 violation is DENIED.

The defendant's final argument for a new trial is that the court erred when it permitted plaintiffs to introduce character evidence on the issue of damages. According to defendant, loss of consortium type damages are unrecoverable in North Dakota, and therefore, character evidence relevant only to mental anguish and loss of companionship was inadmissible. Along this line, defendant also challenges the court's final instruction number twenty-four, defining damages in a wrongful death action to include mental anguish, emotional

distress, and loss of society and companionship. According to defendant, the instruction is not supported by North Dakota law. Plaintiffs disagree.

Defendant presented a bench brief during trial requesting that the court prevent plaintiffs from presenting any character evidence on the issue of consortium type damages. The court was not persuaded then, nor is it now persuaded by the defendant's argument. Plaintiff Weisgram has provided the court with an excellent brief on the North Dakota law of wrongful death damages. As plaintiff notes, defendant has confused the idea of a derivative claim for consortium damages with the direct statutory cause of action for wrongful death. By statute in North Dakota, it is clear that wrongful death damages include noneconomic damages for mental anguish and loss of society and companionship. N.D. Cent. Code § 32-03.2-04 (1996). The court does not agree with defendant's argument that the North Dakota Supreme Court in Butz v. World Wide, Inc., 492 N.W.2d 88 (1992), intended to prevent a surviving child from recovering for loss of society, comfort and companionship, and mental anguish in a wrongful death action. Butz was a personal injury action and thus distinguishable from the present case. Therefore, the court's admission of character evidence on the issue of damages and instruction on wrongful death damages were not prejudicial error. Hence, defendant's motion for a new trial on those grounds is DENIED.

CONCLUSION

For the reasons noted, the defendant's motion for judgement as a matter of law and motion for a new trial are DENIED.

IT IS SO ORDERED.

Dated this 4th day of September, 1997.

RODNEY S. WEBB, CHIEF JUDGE
UNITED STATES DISTRICT
COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No 97-3735NDF

Chad Weisgram, ect., et al.,

Appellees,

vs.

Marley Company, etc., et al.,

Appellants

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMilliam would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

April 26, 1999

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
AUG 25 1999
OFFICE OF THE CLERK

No. 99-161

In the
Supreme Court of the United States
October Term, 1999

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,
Petitioners,

vs.

Marley Company, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

1. *Did the Eighth Circuit correctly apply North Dakota law regarding plaintiffs' burden of proof?*

2. *Was the Eighth Circuit's remand to the district court for entry of judgment as a matter of law in harmony with its prior decisions and decisions of other circuits?*

3. *Did the Eighth Circuit give appropriate deference to the rulings of the district court?*

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STATEMENT OF THE CASE

Introduction and Summary of Argument

The petition should be denied. There is no need to grant Certiorari because the law is clear, and this case is in harmony with it. Contrary to the assertions in petitioners' brief, the Court of Appeal's holding follows established Eighth Circuit law and it is entirely consistent with this Court's pronouncements in *Daubert, General Electric Company v. Joiner, and Kumho Tire*. State Farm and Weisgram were wrong about the law when they informed the trial court and the Eighth Circuit that testimony on engineering issues falls outside the scope of *Daubert*. This Court's decision in *Kumho Tire* confirmed that the Eighth Circuit had been correct all along in its series of cases holding that *Daubert's* reliability criteria do indeed apply to engineers' and technical experts' opinions in product liability cases.

Contrary to the petitioners' arguments, the Eighth Circuit correctly cited and applied North Dakota statutory and case law regarding the plaintiffs' burden of proof in a product liability case and correctly found a complete failure of proof on the issues of product defect and causation, thus entitling Marley to judgment as a matter of law. The appellate court correctly determined that there was not substantial evidence in the record to support the verdict even when the evidence was viewed in the light most favorable to the plaintiffs. The Eighth Circuit did follow its own valid precedents and those of other circuits in determining that judgment as a matter of law is the appropriate disposition where there is not sufficient evidence to support a jury verdict and where the plaintiffs had their day in court. Finally, the Eighth Circuit did extend appropriate deference to the trial judge, but found that the trial court had abused its "admittedly broad" discretion when it admitted "rampant speculation" from plaintiffs' experts.

In summary, the appellate court carefully followed the law of the Eighth Circuit and of this Court in determining that the trial court judgment was wrong and could not stand. There is no reason to grant the petition for Certiorari.

Summary of Facts and Procedural History

Bonnie Weisgram died of smoke inhalation in her home in Fargo. The investigating fireman, Freeman, immediately blamed the heater in the entryway, but he was not aware of critical data that pointed inescapably to the couch in the living room as the source of the fire. A later autopsy revealed Bonnie Weisgram died of carbon monoxide poisoning several hours before the fire in the entryway started. Her blood alcohol level at the time of death was .153. The carbon monoxide gas could only have come from a smoldering fire in the couch. The couch fire could only have been ignited by a smoldering ignition source. The only smoldering ignition source in the house was a cigarette.

At the time of her death, Bonnie Weisgram was divorced and had two adult sons, Chad and Ryan Weisgram. Chad Weisgram and State Farm (the insurer of the Weisgram home) sued Marley Electric Heating Company, a division of Marley Company, and the parent company, United Dominion Industries, Inc. (Marley), alleging negligence and strict liability.

State Farm's expert, Dolence, examined the heater and found no evidence of defect or malfunction. But Weisgram's and State Farm's product liability theory against the heater manufacturer depended upon the fire starting in the entryway, so Dolence constructed an elaborate theory that called for two simultaneous and unrelated failures in the heater,[1] blockage of

[1] Dolence said the thermostat failed, followed immediately by the failure of the backup high limit control. Judge Bowman, writing for the panel majority, described Dolence's theory: ". . . he opined, after fifteen

the heater by a rug, and ignition of vapors under the floor. Dolence had no evidence that these things occurred, so he simply said that they did. Another expert, Lazarowicz, without evidence, and without any experience in studying or testing heaters or thermostat contacts, said that the thermostat contacts in the heater welded together and that serrations in the contacts were a design defect.

In an extensive pretrial motion, Marley asked the district court to strike the expert testimony based on Rule 702 and on this Court's ruling in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The essence of the motion was that the experts ought not be allowed to testify because their opinions were not supported by fact, science, testing, published studies, or anything else. During the pretrial hearing on the motion, the district court acknowledged its duty to act as a gatekeeper but denied the motion, based on its mistaken impression that *Daubert* only applied to "new science" and on its mistaken belief that "bare assertions *are* the proper subject of expert opinions."

Marley counsel advised the district court that the Eighth Circuit had not given *Daubert* so narrow a reading, citing *Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d. 293, 297 (8th Cir. 1996), in which the Eighth Circuit had clearly settled the issue and had applied *Daubert* to exclude plaintiff's engineer's theories on the ground that the theories had not been subjected to testing, peer review, or the other indicia of reliability described in *Daubert*.

In its pretrial *Daubert* motion, Marley set forth at length the reasons why the testimony offered by Dolence and Lazarowicz did not rest on reliable scientific foundation. Not

years of operating, without incident, both the thermostat and the high limit control suddenly and simultaneously 'did not function' to shut the heater off." *App. A-12.* Dolence admitted he had "no idea what caused the thermostat to fail," and he could not determine what caused the high limit control to fail. *Id.*

only did these experts lack the educational background, training, and specialized experience — Dolence on heater design and failure analysis, and Lazarowicz on heater design and evaluation of electrical contacts — but the opinions were themselves completely devoid of any scientific support. Dolence admitted he had not personally conducted any testing and that he was unaware of any studies done by others in support of his theory that a 500-watt heater blocked by a rug could cause a fire by igniting vapors under a fifteen-year-old floor.

Similarly, Lazarowicz admitted he had conducted no testing himself and he proffered no testing by others or any other support for his conclusion that silver contacts in the thermostat had welded then later "unwelded."[2] Lazarowicz had admitted in deposition he was not an expert in contact theory or design and that he did not possess the qualifications to make any statements at all about the condition of the contacts. He admitted he had never designed any contacts and that he had no professional experience in testing them. The district court denied Marley's pretrial *Daubert* motion and allowed all plaintiffs' experts' theories to come in.

Marley had not included the fire investigator, Freeman, in its *Daubert* motion because State Farm and Weisgram had listed Freeman in the magistrate's pretrial order only as a fact witness, and not as an expert. At trial, however, over Marley's repeated objections that Freeman had been declared as a fact

[2] The contacts were no longer "welded" when the heater was examined after the fire. Marley's heater expert, Phy, a company engineer with twelve years of experience examining and testing heater components and electrical contacts, examined the remains of the Weisgram heater. Phy reported that the contact points were "extremely clean and free of pitting and metal transfer," with no sign of welding or sticking. The condition of the contacts, Phy said, proved the contact points were open and that the heater was not carrying current at the time of the fire. Plaintiffs did not challenge Phy's qualifications or his expertise.

witness only, the district court permitted Freeman to opine as an expert on virtually every issue relevant to plaintiffs' theory of the case, including that the heater had malfunctioned and "run away" and that "it had enough heat to radiate over and ignite that sofa."

The case should not have gone to the jury, but did. Marley moved for a directed verdict at the close of plaintiffs' case and again at the close of all the evidence on the ground that the plaintiffs had failed to meet their burden of proof of defect or causation. The trial court denied the motions and the jury returned a verdict for the plaintiffs. After the trial court denied Marley's post-trial motions for judgment as a matter of law and for a new trial, Marley appealed to the Eighth Circuit.

Stating that it had "very carefully" reviewed the "entire transcript of the trial," the Eighth Circuit concluded that neither Freeman nor Dolence were qualified under Rule 702 to testify that the heater was defective, and that Lazarowicz's testimony about the defective thermostat contacts and placement of the high limit control was not sufficiently reliable under Rule 702 to have been admitted in evidence. Finding that these witnesses offered the only evidence of defect and that their testimony had a "substantial influence on the jury's decision," the appellate court held that Marley's post-trial motion for JAML should have been granted. The Eighth Circuit vacated the judgment for the plaintiffs and remanded the case to district court with instructions to grant Marley judgment as a matter of law. After Weisgram and State Farm's petition for rehearing and rehearing en banc was denied, this petition for Certiorari followed.

Petitioners' Recitation of the Evidence is Misleading

Respondents take issue with some of the points in petitioners' statement of the case.[3] Petitioners' statement that a hole was found "*under* the Marley heater" is inaccurate and misleading. When Freeman first noticed the heater, it was already off the wall where it had been mounted. The hole was located "*in front of* the south entryway wall," as it was accurately described by the Eighth Circuit in its opinion. *App. A-3.*

At pages 2-3 of the brief, petitioners reiterated Freeman's and Dolence's testimony that a rug was "pushed onto" and "covered" a portion of the heater. This is misleading, not only because it does not address the Eighth Circuit's explicit concern that Dolence's testimony about the rug's position was pure "conjecture," *App. at A-11,* but also because Dolence admitted at trial that no witness had ever seen a rug blocking the heater and that Freeman had told him on the same day he investigated the fire that he saw "nothing blocking that heater." The notion that a rug was blocking the heater was nothing more than a fabrication by Dolence.

At page 4 of the brief, petitioners described Dolence's *theory* of the blocked heater igniting vapors under the floor as though it were *fact*. Again, this is misleading. The appellate court called these very statements by Dolence "rank speculation." *App. A-12.*

At page 4 of the brief, petitioners described their theory of design defect. They simply summarized again Lazarowicz's observation that there were serrations on the thermostat contacts and his testimony that the thermostat contacts did not "mate squarely" and welded together. But petitioners' discussion on these points misses the point.

[3] The facts as set forth in the Eighth Circuit's opinion in this case, starting at page A-2 of the petitioner's appendix, are correct.

Petitioners did not even attempt to respond to the Eighth Circuit's point: that Lazarowicz had opined to the jury about defects in the heater's design while knowing "practically nothing" about this or any other heater. Petitioners have not tried to argue that Lazarowicz was actually qualified in heater design or that his opinions about the design were actually reliable. Even in view of the Eighth Circuit's exposure of Lazarowicz's total lack of experience, education, or study that would qualify him to testify about the heater's operation or design, petitioners have not come forward with any facts in the record bolstering Lazarowicz's credentials. The Eighth Circuit was correct: Lazarowicz's opinions amounted to no more than "subjective belief or unsupported speculation." *App. A-15.*

Petitioners' contention on page 5 of their brief that Marley's "own testing" proved the design defect in the high limit control is, once again, misleading. In reality, Dr. Ogle, an independent consultant retained by Marley, testified that his testing program conducted on an exemplar heater demonstrated that the high limit switch cycled exactly as it was designed to cycle and that the over-all temperatures seen by the heater were far too low to pose a fire hazard either to a rug or to adhesive under the floor. More to the point, petitioners failed to answer the Eighth Circuit's observation that it was Dolence's own temperature tests that established there was no defect in the heater's design. *App. A-12.* Dolence had checked the temperatures generated by the same exemplar heated that Ogle later tested and found they did not pose a danger. *Id.* Dolence tried, but could not make this 500-watt heater overheat, even at maximum output. *Id.* Based on his own temperature test results, Dolence admitted in deposition and at trial that the Marley heater was not defective in design in any respect. *Id.* Dolence never tested his "run away" heater theory. *Id.* Marley's expert did and proved it false. Dr. Ogle, a highly-credentialed chemical

engineer, testified the Marley heater was not capable of running away.[4]

[4] Plaintiffs challenged neither Dr. Ogle's qualifications nor the scientific methodology employed in his testing program.

REASONS FOR DENYING THE PETITION

The Eighth Circuit Correctly Applied North Dakota Law Regarding Plaintiffs' Burden of Proof

Petitioners, citing nothing, argued at page 8-10 of their brief that the Eighth Circuit refused to follow North Dakota Supreme Court case law on plaintiffs' burden of proof. Again citing nothing, they ask this Court to intercede in the case to ensure that "state substantive right are not trampled upon." The argument is based on a false premise: it incorrectly assumes that the Eighth Circuit failed to address "substantial circumstantial evidence" of the "defective condition" of the heater. In reality, there was no such circumstantial evidence and petitioners have not pointed to any in their brief. Incredibly, they seem to be suggesting that this Court should just *assume* Weisgram and State Farm proved their case by circumstantial evidence.

The Eighth Circuit did correctly cite and apply North Dakota law regarding a plaintiff's burden of proof in a product liability case. It expressly followed the law set forth in *Endresen v. Scheels Hardware & Sports Shop, Inc.* 560 N.W.2d 225, 229 (ND 1997) and in the North Dakota Product Liability Act at § 28-01.3-06 N.D.Cent.Code. Both the *Endresen* court and the North Dakota Product Liability Act require that a product actually have a defect or be in a defective condition at the time of its sale to support a product liability action.[5] Petitioners were not specific in their brief about exactly how the Eighth Circuit misapplied North

[5] § 28-01.3-06 N.D.Cent.Code. states: "no product may be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer."

Dakota law. Since their argument lacks both substance and support, it should be rejected.

In reality, this is not an appropriate case for application of the circumstantial evidence rule. The Eighth Circuit said in *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972) that courts would prefer in a strict liability case to "have proof of a specific defect causing the accident" unless that is not possible because the evidence has been *destroyed. Id. 638.* The evidence in this case was *not* destroyed, but was merely damaged due to exposure to an external fire. Dolence inspected the heater components and testified that he was not able to identify a particular design our manufacturing defect or malfunction, but merely said the thermostat and high limit control *must* have failed. *Weisgram v. Marley Co.*, 169 F.3d 514, 519-20 (8th Cir. 1999); *App. A-12-13.* This is not called "circumstantial evidence" of a "defective condition." This is called "rank speculation" by an expert. *Id.*

Plaintiffs have not explained why this Court should even discuss permitting proof of a defect by circumstantial evidence in a case where it is not possible to exclude an alternative potential cause of the fire. In *Endresen, supra*, the North Dakota Supreme Court said proof by circumstantial evidence is appropriate only where the evidence *"excludes equally reasonable inferences of other causes for which the defendant is not responsible."* (Emphasis added) *Id.* 232. In this case, Marley introduced uncontroverted expert testimony that the fire was caused by cigarette ignition of the couch, which was partially destroyed by the fire. The Eighth Circuit correctly noted that neither the Weisgram family nor State Farm took any action to preserve the couch for inspection or testing by Marley, but discarded it before commencing suit. *Weisgram, supra*, 519, fn. 5; *App.* A-10. Ironically, petitioners' brief at page 1-2 contains an admission that conclusively proves Marley's cigarette ignition theory of the

case was correct. Petitioners report that Freeman found "no evidence of a flaming fire" in the couch, indicating only a *smoldering* fire. Marley's fire reconstruction expert, Dr. Ogle, presented unrefuted scientific evidence that the *smoldering* fire in the couch could only have been ignited by a smoldering ignition source, and the only smoldering ignition source in the house was a cigarette. Plaintiffs could not and did not present a shred of a evidence to contradict this expert opinion.

Under these circumstances, since the evidence did not exclude equally reasonable inferences of another cause of the fire for which the defendant was not responsible, the North Dakota Supreme Court has said that proof by circumstantial evidence is not appropriate. *Endresen, supra*, 232.

Granting Judgment as a Matter of Law Was Proper

Petitioners argued that the Eighth Circuit's holding in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357 (1973) and decisions from four other circuits require a new trial, not a judgment as a matter of law, when expert evidence is erroneously admitted. But *Midcontinent* and the other cases cited in petitioners' brief are not on point, and the Eighth Circuit majority correctly followed Eighth Circuit precedents in *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) and in *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 640 (8th Cir. 1978).

In *Midcontinent*, the trial court granted JNOV when it concluded after a jury verdict that it had erred in admitting certain expert testimony. Part of the appellate court's rationale for determining that JNOV was not appropriate in that particular case was its concern that the plaintiff, if forewarned, might have supplied "further foundation or even totally different evidence." *Id.* 359. These circumstances are clearly distinguishable from the facts in the case at hand.

There is no suggestion in this case that the plaintiffs had any additional foundation or further proof that they could have introduced to bolster their theory that a heater defect caused the fire. To the contrary, as the Eighth Circuit majority panel pointed out in footnote two of the opinion, Weisgram and State Farm had their day in court.[6] No litigant is entitled to more than that. There is no reason to reopen discovery here. The Eighth Circuit reached the same conclusion when it granted judgment as a matter of law to the defendant in *Peitzmeier v. Hennessy, supra*, after the trial court determined plaintiff's expert testimony was inadmissable. Similarly, in *Wright v. Willamette, supra*, the Eighth Circuit reversed the trial court's denial of JMAL after it determined the trial court had admitted improper expert testimony.

As the Eighth Circuit panel majority rightly pointed out, Weisgram's and State Farm's entire theory was based on "rampant speculation," not substantial evidence. Under established Eighth Circuit law, expert speculation cannot support a judgment. *Omaha Indian Tribe, supra*, 640-46. This case should never have gone to the jury, but did. By rights, the trial court should have granted Marley's motion for a directed verdict at the close of plaintiffs' case on the stated ground that plaintiffs had a complete failure of proof as to a design defect and as to any mechanism by which this 500-watt heater, even if it had continued to run, could have "run away" and caused a fire.

---

[6] The Court of Appeals rejected any contention that it was required to remand for a new trial to give plaintiffs the opportunity to reopen discovery and identify additional witnesses: "We can discern no reason to give the plaintiffs a second chance to make out a case of strict liability . . . (citations omitted) *This is not a close case.* The plaintiffs had a fair opportunity to prove their claim and they failed to do so." *Weisgram, supra*, at fn. 2. (Emphasis added).

The trial court had another opportunity to grant a directed verdict at the close of all the evidence when Marley again pointed out that the plaintiffs had failed to meet their burden of proof because neither Dolence nor Lazarowicz had provided an explanation of the cause of the fire. Failing that, the trial court should have granted Marley's post-trial motion for JMAL, when Marley demonstrated that plaintiffs entire case was based on unsupported expert speculation, which has never been allowed to support a verdict in the Eighth Circuit before or after *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) ("The word 'knowledge' connotes more than subjective belief or unsupported speculation.") Marley informed the trial court in its motion for JMAL that the Eighth Circuit's pre-and post-*Daubert* case law has never allowed experts to speculate and has always held that expert speculation is not substantial evidence to support a judgment.

The trial court's denial of JMAL was a legal question that was fully reviewable in the Eighth Circuit based on the same standard that was before the district court: whether there was sufficient evidence to support the verdict. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1400 (8th Cir. 1994). Under the circumstances of this case, *Midcontinent* is not the relevant precedent. The Eight Circuit did not simply "excise" the expert opinion as the trial judge in *Midcontinent* did in reaching its conclusion that there was no substantial evidence to support the verdict. Rather, after "carefully reviewing" the "entire record," the panel majority took pains to explain that plaintiffs' entire proof consisted of no more than "subjective belief and unsupported speculation," which it said was insufficient to prove the heater defective under the North Dakota law of strict products liability. *Weisgram, supra*, 521-22; *App.* A-15-17. In this respect, *Omaha Indian Tribe, supra*, and *Wright v. Willamette, supra*, provided ample Eighth Circuit precedent for granting JMAL. In *Omaha Indian Tribe*, which was decided after *Midcontinent*, the

Eighth Circuit vacated and remanded to the trial court with directions to enter judgment in favor of the tribe after determining that the land owners' experts' opinions were mere speculation, not "substantial evidence." *Id.* 646.

Petitioners cited a Sixth Circuit decision, *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992), in support of their argument that a new trial, not JMAL, is the appropriate remedy when evidence is erroneously admitted at trial. Petitioners neglected to point out, however, that, in a recent case, the Sixth Circuit, like the Eighth Circuit, reversed a jury verdict for the plaintiff and remanded for an entry of judgment as a matter of law in favor of the defendant where the appellate court found the plaintiff could not sustain its burden of proof in the absence of expert testimony which had been erroneously admitted. In *Smelser v. Norfolk Southern Railway Co.*, 105 F.3d 299, 302-3 (6th Cir. 1997), the appellate court held that the trial court failed to determine whether plaintiff's expert's training and qualifications related to the subject matter of his proposed testimony. Before trial, the district court denied Norfolk's motion in limine challenging the expert's proposed testimony on a seatbelt defect issue. After the jury returned a verdict for the plaintiff, Norfolk appealed. The Sixth Circuit reversed and remanded for entry of judgment as a matter of law for Norfolk, saying that if the trial court had adequately performed its gatekeeping function, the expert's testimony would not have been admitted. *Id.* at 303. The Sixth Circuit concluded that even though plaintiff's expert was a Ph.D. biomechanic, his opinions failed to qualify as scientific knowledge under Rule 702 because he failed to perform appropriate tests to verify his conclusion that the seatbelt was defective, and his opinion testimony about causation exceeded his expertise in biomechanics. Without plaintiff's expert's testimony, the Sixth Circuit concluded the plaintiff failed to meet his burden of proof and the trial court should have granted Norfolk's

motion for a directed verdict. It remanded the case for entry of JMAL.

Similarly, under the circumstances of this case, the Eighth Circuit acted well within its discretion in granting JMAL to Marley.

The Eighth Circuit Gave Appropriate Deference to the Rulings of the District Court

Contrary to petitioners' suggestion at page 11 of the brief, the Eighth Circuit did not conduct a *de novo* review of plaintiffs' experts' testimony. Instead, the Eighth Circuit explicitly and repeatedly stated that it was indeed applying the abuse-of-discretion standard to the district court's evidentiary decisions, as required by this Court's decision in *General Electric Co. v. Joiner*, 118 S.Ct. 512, 519 (1997) and by previous rulings of the Eighth Circuit. See, e.g., *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995). Even though the Eighth Circuit accorded due deference to the trial court, the majority panel nevertheless said eight times that the trial court abused its admittedly broad discretion when it allowed "blatant speculation" from Freeman, "rank speculation" from Dolence, "unsupported speculation" from Lazarowicz, and "rampant speculation" from all three experts about 'how the 'runaway' heater might have ignited the fire." *Weisgram, supra*, 518-21; *App. A-9-16.*

The Eighth Circuit's opinion is entirely in harmony with this Court's recent decision in *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). *Kumho Tire* clarified that *Daubert's* gatekeeping obligation applies to all expert testimony and reiterated *Joiner's* holding that abuse of discretion is the appropriate standard of review. The Eighth Circuit explained that it was following *Joiner* precisely when it concluded that the nexus between Lazarowicz's observations of the contacts and his conclusion that the heater was defective was not

scientifically sound. Finding "simply too great an analytical gap between the data and the opinion proffered," the Eighth Circuit concluded that the trial court abused its discretion in allowing the testimony. *Weisgram, supra*, 521; *App.* A-16, citing *Joiner* at 118 S.Ct. 512, 519. Since the Eighth Circuit followed *Joiner*, it follows that it did extend appropriate deference to the trial judge. *Kumho Tire* requires nothing more.

Kumho Tire does not require, as petitioners seem to be suggesting in their brief, a rubber stamp of every trial court ruling admitting or excluding expert testimony. As Justice Scalia noted in his concurring opinion in *Kumho Tire*, "trial court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function." *Kumho, supra*, 1179.

When an able and experienced trial court abuses its "admittedly broad" discretion by admitting "rampant speculation" by experts, it is incumbent upon the appellate court to so hold — and to reverse where, as here, the testimony influenced the jury. There would be no need for appellate review of evidentiary decisions if trial courts were free to admit expert opinions without first determining if the expert was reliable and without first scrutinizing the opinion for some indicia of reliability.

CONCLUSION

The trial court did abandon its gatekeeping function in this case. The Eighth Circuit majority was right to hold that this was an abuse of discretion. The Eight Circuit had it right when it said this was not a close case. The jury verdict could not stand and judgment as a matter of law was the appropriate remedy. Since the Eighth Circuit's holding followed the valid precedents of this Court and those of the Eighth Circuit, there is no conflict and no reason for granting petitioners' writ of Certiorari.

The Petition for Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 99-161

In the Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.

Petitioner,

vs.

Marley Company, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED: SEPTEMBER 28, 1999

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U.S. District Court
District of North Dakota (Southeastern)

CIVIL DOCKET FOR CASE #: 95-CV-103

Weisgram v. Marley Company, et al — Filed: 07/31/95
Assigned to: Hon. Rodney S. Webb — Jury demand: Both
Referred to: Hon. Karen K. Klein
Demand: $50,000 — Nature of Suit: 365
Lead Docket: 95-CV-104 — Jurisdiction: Diversity
Dkt # in member : is 3:95-cv-00104

Cause: 28:1332 Diversity-Personal Injury

CHAD WEISGRAM,
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and on behalf of the heirs of
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decedent,
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MARLEY ELECTRIC HEATING COMPANY, a Delaware Corporation, and defendant	James S. Hill (See above) [COR LD NTC] Christine A. Hogan (See above) [COR LD NTC]
UNITED DOMINION INDUSTRIES INC., a Delaware Corporation defendant	James S. Hill (See above) [COR LD NTC]

Docket as of October 10, 1997 10:17 am
Page 1 NON-PUBLIC

INTERNAL USE ONLY: Proceedings include all events.
3:95cv103 Weisgram v. Marley Company, et al

7/31/95	1	COMPLAINT (Summons issued-1); jury demand (jo) [3:95cv103]
7/31/95	2	RECEIPT #1716 for filing fee of $120 (jo) [3:95cv103]
8/10/95	3	RETURN OF SERVICE executed upon defendant Marley Company on 7/31/95 Answer due 8/20/95 for Marley Company (dst) [Entry date 08/15/95] [3:95cv103]
8/23/95	4	ANSWER by defendant United Dominion Ind. and its subsidiary, the Marley Co; to [1-1]; jury demand (jo) [3:95cv103]
8/31/95	5	ANSWER by defendant Marley Company, defendant United Dominion Ind to [1-1]; jury demand (rh) [Entry date 09/05/95] [3:95cv103]
9/19/95	6	ORDER by Hon. Karen K. Klein Scheduling/discovery conference set for 10/26/95 at 10:30 AM (cc: all counsel) (1j) [3:95cv103]
10/26/95	7	CLERK'S MINUTES: of 16b Sched. Conf. before Hon. Karen K. Klein ; Scheduling conference held Oct. 26, 1995; crt rec'd plan; csnl may Consent to Proceed Bef. Mag. Judge; no trial or final p/t set today; Mag. Klein will handle early sett. conf. in both cases A3-95-104-State Farm v. Marley Co. on Sept. 27, 1996 at

9:00 in Fgo; (jo) [Entry date 10/31/95] [3:95cv103]

11/1/95 8 SCHEDULING ORDER Hon. Karen K. Klein ; Discovery set for 10/1/96 ; dispositive motions due by 11/1/96 ; Motion to amend pleadings ddl 1/1/96 ; Expert report due 4/15/96 by pla's & deft's rpts due 5/15/96; Expert witness ddl 4/1/96 by pla's & deft's ddl due 5/1/96 ; Motion to join additional parties ddl 1/1/96; Csl considering to Proceed Bef. Mag. Judge; JT est. 10 days; w/ORDER ENDORSED THEREON APPROVING PLAN; (jo) [3:95cv103]

11/29/95 9 NOTICE of Setting: Jury trial scheduled for February 24, 1997 at 9:30 AM in Fargo bef Judge Webb, Conf. with Court and Counsel at 8:45 in LL Courtroom. Prop Jury Instructions to be filed 10 days prior to trial. Trial Est: 10 days (cc: all counsel, court officials) (mc) [3:95cv103]

12/5/95 10 ORDER by Hon. Karen K. Klein: settlement conference set for 9/27/96 at 9:00 AM, Judge's chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv103]

1/3/96 11 ORDER by Hon. Karen K. Klein: Final Pretrial conference set for 2/3/97 at 1:30 PM, Judge's chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv103]

1/24/96 12 MOTION by pla State Farm to consolidate case w/A3-95-104 (jo) [Entry date 01/25/96] [Edit date 01/25/96] [3:95cv103]

1/24796 13 MEMORANDUM in support of motion to consolidate case w/A3-95-104 [12-1] (jo) [Entry date 01/25/96] [3:95cv103]

2/12/96 14 ORDER by Hon. Rodney S. Webb; granting motion to consolidate case w/A3-95-104 [12-1]; for trial purposes only; 3:95-cv-103 being the lead case 3:95-cv-104 being the member case (cc: all counsel) (jo) [Entry date 02/15/96] [Edit date 02/15/96] [3:95cv103]

2/12/96 -- Docket Modification (Utility Event) Case consolidated for trial purposes; member case A3-95-104 (jo) [Entry date 02/15/96] [3:95cv103]

9/30/96 -- REMARK - Settlement Confr bef Judge Klein on 9/27/96 - case did not settle. (lj) [3:95cv103]

9/30/96 15 MOTION (REQUEST) by defendants to continue (for change of p/trial conference) w/attached Affidavit of Atty Hill (sb2) [3:95cv103]

10/1/96 16 ORDER by Hon. Karen K. Klein with NOTICE OF ENTRY: Discovery ddl ext to 12/31/96; Dispositive motion cutoff ext to 11/15/96; Final Pretrial conference reset from 2/3/97 at 1:30 to 1/24/97 at 10:00; settlement conference set for 1/24/97 (cc: all counsel) (lj) [3:95cv103]

10/1/96 -- Docket Modification (Utility Event) granting motion to continue (for change of p/trial conference) [15-1] (lj) [3:95cv103]

10/3/96 17 STIPULATION and Protective ORDER by Hon. Rodney S. Webb (see order for specifics) (cc: all counsel) (sb2) [3:95cv103]

1/14/97 18 MOTION by dft Marley Electric Htg FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING (sg) [Entry date 01/16/97] [3:95cv103]

1/14/97 19 BRIEF IN SUPPORT OF MOTION FOR CONTINUANCE FILED by dft Marley Electric Htg regarding Motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] (sg) [Entry date 01/16/97] [3:95cv103]

1/17/97 20 RESPONSE by State Farm Ins. to motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] (jo) [3:95cV103]

1/17/97 21 NOTICE of Setting: setting hearing on motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] at 9:30 on 1/22/97 bef Judge Klein (cc: all counsel, court officials) (lj) [3:95cv103]

1/22/97 22 CLERK'S MINUTES: of hearing on motion to continue before Hon. Karen K. Klein, counsel state their positions; Judge w/review written response of pltf - then will hope to enter a written ruling yet today; discussion re: possible trial dates if continuance is granted (18-1) (lj) [3:95cv103]

1/22/97 23 ORDER by Hon. Karen K. Klein: granting motion FOR CONTINUANCE OR, IN THE ALTERNATIVE, TO PRECLUDE EXPERT TESTIMONY AND REQUEST FOR EXPEDITED HEARING [18-1] ; Final Pretrial conference contd to 5/2/97 at 1:30; Jury trial contd to 5/19/97. Dft's alternative motion to preclude exprt testimony of Sandy Lazarowicz is denied as moot. (cc: all counsel) (lj) [Entry date 01/23/97] [3:95cv103]

1/24/97 24 MOTION by plaintiff for protective order w/attached Cert. of Compliance w/Local Rule 16.1(b)(4) (jo) [3:95cv103]

1/24/97 25 MEMORANDUM by plaintiff in support of motion for protective order [24-1] (jo) [3:95cv103]

1/24/97 26 NOTICE of Setting: Final Pretrial conference bef Judge Klein scheduled for 5/2/97 at 1:30 followed by settlement conference, US Crthse, Fargo (cc: all counsel, court officials) (lj) [3:95cv103]

1/27/97 27 NOTICE of Setting: Jury trial scheduled for Mon., 05/19/97 at 9:30 am in Fgo, bef Judge Webb; trial est. 10 days; Conf w/ crt and counsel in lower level crtrm. This trial was previously set for Mon., 02/24/97 (cc: all counsel, court officials) (sg) [3:95cv103]

1/31/97 28 LTR BY ATTY for dfts Marley Company and United Dominion Ind re pla mtn for protective order [24-1]: advising counsel resolved matter on Jan 24, 1997, Atty Strandness for pla with be withdrawing his mtn---no response by dfts. (copy to Crt) (ak) [3:95cv103]

4/18/97 29 NTC OF MTN & MOTION by plaintiff in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen (jo) [3:95cv103]

4/18/ 97 30 MEMORANDUM(BRIEF) by plaintiff in support of motion in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen [29-1] (jo) [3:95cv103]

4/18/97 31 AFFIDAVIT of Paul E. Strandness regarding memorandum [30-1] w/attached exhibits; (jo) [3:95cv103]

4/21/97 32 MOTION by defendants to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); (jo) [3:95cv103]

4/21/97 33 MEMORANDUM by defendantin support of motion to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); [32-1] w/attached tabs 1 & 2 and copy of Depo and attachments along w/a video tape called Bonnie Weisgram/Baseboard heater Analysis/John Gorman P.E. 8/96; (jo) [3:95cv103]

4/22197 34 MOTION by pla State Farm to compel production of documents; Consumer Product Safety Commission docs in connection w/Berko/Marley Co MBBM and MBBL series heaters. (dj) [3:95cv103]

4/22/97 35 MEMORANDUM (Brief) by pla State Farm in support of motion to compel production of documents [34-1] (dj) [3:95cv103]

4/22/97 36 CERTIFICATE OF COMPLIANCE w/Local Rule 16.1(b)(4) by pla State Farm, regarding mtn to compel production of documents (34-1) (dj) [3:95cv103]

5/2/97 37 RESPONSE by defendant, Marley to motion to compel [34-1]CPSC documents; (jo) [3:95cv103]

5/2/97 38 CLERK'S MINUTES: of final p/t conf. before Hon. Karen K. Klein trial procedure discussed; witn. will not be excluded from the crtrm; Crt will rule on mtns #32(John Gorman issue) & 34(compel prod. of docs) after all csnl has responded; Crt will approve p/t stmt plan upon orig. being submitted; RECESS (jo) [3:95cv103]

5/6/97 39 RESPONSE(BR IN OPP) by plaintiff to motion to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); [32-1] (jo) [3:95cv103]

5/7/97 40 Pla, State Farm's NTC OF MTN & MOTION to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; (jo) [3:95cv103]

5/7/97 41 MEMORANDUM in support of motion to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; [40-1] w/attached exhibits; (jo) [3:95cv103]

5/7/97 42 Designation of depo. to be used at trial by pla State Farm (jo) [3:95cv103]

5/9/97 43 TRIAL BRIEF submitted by pla State Farm; (jo) [3:95cv103]

5/9/97 44 TRIAL BRIEF submitted by pla (sg) [3:95cv103]

5/9/97 45 JOINT PROPSED SPECIAL VERDICT and JOINT PROPOSED JURY INSTRUCTIONS by plaintiff (sg) [3:95cv103]

5/12/97 46 OBJECTION (MOTION) BY DFTS TO PLA'S Rule 26 Expert Rebuttal witness disclosure Rule 26(a)(2); [32-1] (jo) [Edit date 05/20/97] [3:95cv103]

5/14/97 47 MOTION by defendants in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plats; (jo) [3:95cv103]

5/14/97 48 MEMORANDUM by defendantin support of motion in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plats; [47-1] w/attached exh (jo) [3:95cv103]

5/14/97 49 RESPONSE by defendant to motion to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; (40-1) (jo) [3:95cv103]

5/14/97 50 RESPONSE by defendant to motion in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen [29-1] w/attached exh. 1; (jo) [3:95cv103]

5/15/97 51 Requested JURY INSTRUCTIONS by defendants (faxed copy of same recvd on 5/14/97) (sb2) [3:95cv103]

5/15/97 -- REMARK - Revised Exhibit List received (sb2) [3:95cv103]

5/15/97 -- REMARK - recvd copy of dft's trial memorandum via fax this date (original to follow) (sb2) [3:95cv103]

5/15/97 52 ORDER OF FINAL PRE-TRIAL by Hon. Karen K. Klein PTC held 1:30 5/2/97 (cc: all counsel) (sb2) [Entry date 05/16/97] [3:95cv103]

5/16/97 53 RESPONSE(BRIN OPP) by plaintiff to motion in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plats; [47-1] (jo) [3:95cv103]

5/16/97 54 TRIAL BRIEF submitted by defendants (td) [3:95cv103]

5/16/97 55 MOTION by defendants for hearing to exclude expert testimony of John Gorman, Ralph Dolence, and Sandy Lazarowicz under Rule 702 (td) [3:95cv103]

5/16/97 56 MEMORANDUM (BREIF IN SUPP) by dfts in support of motion for hearing to exclude expert testimony [55-1] (td) [3:95cv103]

5/16/97 57 LETTER from plaintiff's counsel indicating that mtn for protective order filed 1/23/97 has been withdrawn (sb2) [Entry date 05/19/97] [3:95cv103]

5/16/97 -- Docket Modification (Utility Event) finding the motion for protective order [24-1] moot, pla has w/drawn the mtn (sb2) [Entry date 05/19/97] [3:95cv103]

5/16/97 58 LETTER from plaintiff's counsel re: its experts for the trial & a short summary of their testimony (sb2) [Entry date 05/19/97] [3:95cv103]

5/16/97 -- REMARK - recvd faxed copy of requested jury instruction #32A, submitted by dfts (sb2) (Entry date 05/19/97] [3:95cv103]

5/16/97 59 CLERK'S MINUTES: of status conference before Hon. Rodney S. Webb; Discussion re: certain trial issues - pla allowed 15 minutes for voir dire and dfts to have 20 minutes; Discussion re: certain trial issues & expert testimony; Crt will deny any Daubert mtn hrgs in advance of trial & may reconsider these issues as trial commences, Crt reviews its Civil procedural order w/counsel; trial estimate: 8 days; Opening statements limited to one hour; Witnesses will not be excluded from crtroom (sb2) [Entry date 05/19/97] [3:95cv103]

5/19/97 60 LETTER from defendants' counsel re: expert witness testimony (sb2) [3:95cv103]

5/19/97 61 Requested JURY INSTRUCTIONS by defendants, #32A (sb2) [Entry date 05/20/97] [3:95cv103]

5/19/97 62 LETTER from plaintiff's counsel re: requested jury instruction #32A, submitted by dfts w/attached case law (sb2) [Entry date 05/20/97] [3:95cv103]

5/19/97 63 Bench BRIEF FILED by defendants to prohibit pla's introduction of evidence of Bonnie Weisgram's good character (sb2) [Entry date 05/20/97] [3:95cv103]

5/19/97 -- CLERK'S MINUTES: of Clerk's Minutes of Jury Trial before Hon. Rodney S. Webb trial commenced this date; Conf held w/counsel, crt sets out general trial procedures; crt denies mtn & hrg concerning the Daubert matter, counsel inform crt parties have agreed as to what damages State Farm has pd, proposed voir dire is suggested by counsel; crt reserves ruling re: Consumer Product Safety Commission investigation of a different Marley heater, crt will expect dfts to accommodate pla re: expert witness who had an emergency this weekend; crt & counsel discuss Rule 26 disclosures, crt directs cooperation from counsel; 14 jurors having previously been drawn, crt makes prel. comments, jurors sworn to ans questions, voir dire commences; (prel. instructions given to counsel at 11:10); counsel state no challenges for cause for jury & exercises challenges; Trial jury of 8 selected & sworn to hear case; Crt gives prel. instructions to jury; Counsel give opening statements; Pla's case commences. (sb2) [Entry date 05/20/97] [3:95cv103]

5/20/97 64 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY: ruling reserved on motion by dfts to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen; denying dfts'

motion in limine re: to prohibit duplicate opening statements, multiple wit. exam. & contrasting argument by consolidated plas; [47-1] denying motion to preclude John Gorman from giving expert test. for non-compliance with Rule 26(a)(2); [32-1] denying motion to exclude testimony of Richard Moore based upon late disclosure and the cumulative nature of his testimony; [40-1] denying motion by dfts to preclude Howard DeMatties from giving expert testimony; and denying dfts' mtn & request for a hrg to exclude testimony of John Gorman, Ralph Dolence & Sandy Lazarowicz; crt will make Rule 702 determinations during trial as testimony & qualifications of experts are presented and will entertain qualification challenges & requests for Daubert hrgs upon proper objection. (copies to counsel) [46-1] (cc: all counsel) (sb2) [3:95cv103]

5/20/97 -- Docket Modification (Utility Event) denying motion for hearing to exclude expert testimony [55-1], denying motion to compel [34-1], denying motion in limine to exclude from trial the unqualified & inadmissible forensic opinions related to the cause of decedent's death as proffered by Dr. Paul D. Larsen [29-1]; see docket # 64, order of crt (sb2) [3:95cv103]

5/20/97 -- CLERK'S MINUTES: of 2nd day of Jury Trial before Hon. Rodney S. Webb: Plas case continues at 9:00 am. Recess 4:50 pm, Reconvene 5/21/@ 9:00 am (td) [Entry date 05/21/97] [3:95cv103]

5/21/97 65 TRANSCRIPT OF DEPOSITION of Merle Higgs (submitted by dft); this witness testified by depo at jury trial (sb2) [Entry date 05/23/97] [3:95cv103]

5/21/97 -- CLERK'S MINUTES: of 3rd day Jury Trial before Hon. Rodney S. Webb; Plats case continues; discussion in crtroom re: juror Dawn Lemieux--she does know the decedent in this case & just realized that fact this morning, crt excuses jury from any further deliberations, case will be heard before a jury of seven; Plats case continues. (sb2) [Entry date 05/23/97] [3:95cv103]

5/22/97 66 TRANSCRIPT OF DEPOSITION of Matthew Miner (submitted by pla), depo read into record as part of plats case (sb2) [Entry date 05/23/97] [3:95cv103]

5/22/97 -- CLERK'S MINUTES: of 4th day of Jury Trial before Hon. Rodney S. Webb; Plats case continues, Pla rests w/exception to call expert witness Lazarowicz next week; Dft presents its case. (sb2) [Entry date 05/23/97] [3:95cv103]

5/23/97 -- CLERK'S MINUTES: of JURY TRIAL - 5th DAY before Hon. Rodney S. Webb-Fgo: Dfts' case continues - RECESS-4:40 PM (dj) [Entry date 05/28/97] [3:95cv103]

5/27/97 -- CLERK'S MINUTES: of JURY TRIAL - 6th DAY before Hon. Rodney S. Webb-Fgo: Dfts' case continues - crt having ruled that wit Sandy Lazarowicz is permitted to testify and his

testimony is heard - Plas REST - out of hrg of jury, plas resist dfts' R.50 mtn - crt DENIES same - dft moves for mistrial - resisted and DENIED by crt - RECESS-5:05 PM witness Sandy Lazarowicz testifies (dj) [Entry date 05/28/97] [3:95cv103]

5/28/97 67 Bench BRIEF ON LOSS OF CONSORTIUM DAMAGES by defts (dj) [3:95cv103]

5/28/97 -- CLERK'S MINUTES: of JURY TRIAL - 7th DAY before Hon. Rodney S. Webb-Fgo: Dfts' case continues - dfts REST - Plas present rebuttal and all parties re-rest at 2:00 PM - R.50 mtn is re-newed - resisted - mtn denied; counsel having been provided w/crt's final instr, crt hears exceptions crt advises counsel of procedures re, closing arguments; crt's Final Instr will be available from Clk tomorrow at 8:30 AM - RECESS 4:35 PM (Counsel go over exs after recess to determine which exs will go to the Jury) (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 68 CLERK'S MINUTES: of JURY TRIAL - 8th DAY before Hon. Rodney S. Webb-Fgo: Crt reconvenes and Final Instr given closing arguments and rebuttal presented - procedural instr by crt - CSO & Law Clerk sworn - CASE TO JURY-12:10 PM; counsel indic they are sat w/exs which will go to jury RECESS; Crt RECONVENES to receive verdict-5:30 PM - verdict read in favor of plas - jurors polled, verdict is unanimous and jurors excused and their service acknowledged - Jury excused - crt

comments - ADJOURN-5:40 PM (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 69 PRELIMINARY JURY INSTRUCTIONS, dated May 19, 1997. (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 70 FINAL JURY INSTRUCTIONS, dated May 29, 1997. (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 71 CRT'S RULINGS ON PROPOSED JURY INSTRUCTIONS (dj) [Entry date 06/03/97] [3:95cv103]

5/29/97 72 VERDICT for plas Chad Weisgram; and State Farm Fire & Casualty Ins. and against defts Marley Company, Marley Electric Htg and United Dominion Ind; FINDING (that among other things), ECONOMIC DAMAGES of $100,575.42; NON-ECONOMIC DAMAGES of $500,000 for TOTAL of $600,575.42, no int awarded. (cc: all counsel) (dj) [Entry date 06/03/97] [3:95cv103]

5/30/97 73 RECEIPT by Atty Hogan for exs #393, 394 & 427, pur to Local R. 43.1(B) (Heater exs) (dj) [Entry date 06/03/97] [3:95cv103]

6/17/97 74 JUDGMENT: with NOTICE OF ENTRY: that pla Chad Weisgram, decedent, have judgment against dfts in the sum of $500,000, w/o int; and pla State Farm Fire and Casualty Insurance Company, have judgment against dfts in the sum of $100,575.42, w/o int. terminating case (3:95-cv-00104 3:95-cv-00104) (cc: all counsel)

{09/30/97-Pla State Farm stip bill of costs approved in at of $12,631.19, Doc 194 ---- ak} (dj) [Edit date 10/01/97] [3:95cv103]

6/24/97 75 NOTICE OF ENTRY OF JUDGMENT by Pla State Farm. (dj) [3:95cv103]

6/27/97 76 MOTION by defendant Marley Company for judgment, or alternatively for new trial with supporting brief (ks) [Entry date 06/30/97] [3:95cv103]

6/27/97 77 MOTION by defendant Marley Company to stay of execution of jgm (ks) [Entry date 06/30/97] [3:95cv103]

6/27/97 78 AFFIDAVIT of Christine Hogan regarding motion to stay of execution of jgm [77-1] (ks) [Entry date 06/30/97] [3:95cv103]

7/14/97 79 RESPONSE (BRIEF IN OPP) by pla State Farm to motion for judgment [76-1], motion for new trial [76-2] (td) [Edit date 07/14/97] [3:95cv103]

7/14/97 80 RESPONSE by pla State Farm to motion to stay of execution of jgm [77-1] (td) [Edit date 07/14/97] [3:95cv103]

7/14/97 81 STIPULATED BILL OF COSTS submitted by pla State Farm re judgment [74-2] (td) [3:95cv103]

7/14/97 82 AFFIDAVIT of Daniel J. Dunn regarding bill of costs [81-1] (td) [3:95cv103]

7/15/97 83 RESPONSE by pla Weisgram to motion to stay of execution of jgm [77-1] (td) [3:95cv103]

7/15/97 84 RESPONSE (BRIEF IN OPP) by pla Weisgram to motion for judgment [76-1], motion for new trial [76-2] (td) [3:95cv103]

7/15/97 -- REMARK - Table of Authorities of Pla State Farm Ins att to doc# 79 (td) [3:95cv103]

7/23/97 85 MOTION by deft Marley for leave to file reply brief in support of its post-trial mtns on or before 08/12/97. (dj) [3:95cv103]

8/7/97 86 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY: granting dft Marley's motion for leave to file reply brief [85-1] (cc: all counsel) (sb2) [3:95cv103]

8/13/97 87 REPLY (BRIEF IN SUPPT) by dft Marley Company to response to motion for judgment [76-1], motion for new trial [76-2] (td) [3:95cv103]

9/4/97 88 MEMORANDUM AND ORDER by Hon. Rodney S. Webb denying mtn for judgment as a matter of law [76-1], and denying mtn for new trial [76-2] with NOTICE OF ENTRY: (cc: all counsel) (dj) [3:95cv103]

9/4/97 89 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY: granting mtn to stay of execution of jgm pending disposition of an appeal [77-1], upon the filing of a bond w/this crt securing pmt of the June 17, 1997 jgm;

further ORDERED dft's mtn for stay on the execution of jgm pending disposition of post-trial mtns is DENIED AS MOOT in light of the crt's decision on those mtns filed this date. (cc: all counsel) (dj) [3:95cv103]

9/16/97 90 AFDT OF MAILING by dft, for proposed Bond on Stay of Execution =and= proposed order (ak) [3:95cv103]

9/16/97 -- PROPOSED Order re crt order that bond securing jdmt be filed [89-1]; and proposed Bond w/proposed order endorsed were submitted by dfts and lodged w/Clk (ak) [3:95cv103]

9/26/97 91 LTR OF ATTY DUNN for pla Chad Weisgram, that State Farm has no obj to supersedeas bnd obtained by Marley Co, nor does Atty Strandness (ak) [Entry date 09/29/97] [3:95cv103]

9/26/97 92 SUPERSEDEAS BOND ON STAY OF EXEC in amt of $ 600,575.42 filed by dfts Marley Company, Marley Electric Htg, United Dominion Ind, w/att POWER OF ATTY by Fed Ins Company of Warren, NJ, dated 09/11/97. Crt approval of bnd endorsed thereon 09/26/97. Bnd filed in compliance with crt order of 09/04/97, [89-1] (ak) [Entry date 09/29/97] [Edit date 09/29/97] [3:95cv103]

9/26/97 93 ORDER by Hon. Rodney S. Webb : re supersedeas bnd [92-1], crt having approved bnd, the execution of any procs to enforce jdmt

is stayed pending appeal (cc: all counsel) (ak) [Entry date 09/29/97] [3:95cv103]

9/30/97 94 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY endorsed as 10/01/97: approving Pla State Farm stip bill of costs [81-1], in amt of $12,631.19; the crt having rcvd no obj from Dft Marley. Said costs inserted on jdmt entered 06/17/97, [74-1]. (cc of order and revised Jdmt Doc #74 mailed to Attys Strandness, Dunn, Hill/Hogan) (ak) [Entry date 10/01/97] [3:95cv103]

10/2/97 95 NOTICE OF APPEAL to USCA8 by dfts Marley Company, Marley Electric Htg, United Dominion Ind from USDC final Jdmt [74-2], entered 06/17/97; from denial of mtn for dir verdict by dfts at close of all testimony on 05/28/97; and from Memorandum & Order entered 09/04/97 that den dfts' mtn for jdmt as matter of law, or alt, for new trial. App fee $105 pd by dfts. (ak) [Entry date 10/09/97] [3:95cv103]

10/2/97 96 RECEIPT #64227 - $105 APPEAL FEE pd by dfts (ak) (Entry date 10/09/97] [3:95cv103]

10/2/97 -- ORDER FOR APPELLATE TRANSCRIPT rcvd from dfts for various transcripts. Order presented to Crt Reptr Ketcham for ACK (ak) [Entry date 10/09/97] [3:95cv103]

10/10/97 -- REMARK - Copy of Ntc of App to Attys Strandness and Dunn for pla-appellee (ak) [3:95cv103]

10/10/97 97 Copy of doc entries as forwarded to counsel and USCA8 (ak) [3:95cv103]

10/10/97 -- 2 CERTIFIED and one pl copy of: NTC APP; JDMT; MEMORANDUM & ORDER deny post-jdmt mtns; SUPERSEDEAS BOND; Jury Verdict; and DOCKET ENTRIES, forwarded to USCA8, St. Paul Div Office (ak) [3:95cv103]

INTERNAL USE ONLY: Events between 10/17/97 and 3/17/98.
3:95cv103 Weisgram v. Marley Company, et al
TERMED CSSTAY APPEAL LEADTR

TERMED CSSTAY APPEAL LEADTR

U.S. District Court
District of North Dakota (Southeastern)

CIVIL DOCKET FOR CASE #: 95-CV-103

Weisgram v. Marley Company, et al Filed: 07/31/95
Assigned to: Hon. Rodney S. Webb Jury demand: Both
Referred to: Hon. Karen K. Klein
Demand: $50,000 Nature of Suit: 365
Lead Docket: 95-CV-104 Jurisdiction: Diversity
Dkt # in USCA8 #97-3735NDF : is :00- -00000
Dkt # in member : is 3:95-cv-00104

Cause: 28:1332 Diversity-Personal Injury

11/10/97 -- BR SCHED from USCA 197-3735NDF (ak) [Entry date 11/26/97] [3:95cv103]

3/16/98 100 TRANSC OF FINAL P/T CFR, held 05/19/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 101 TRANSC OF OPEN STMTS held 05/19/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 102 TRANSC OF JURY TRIAL (7 VOLS), proceedings reported: May 19,20,21,22,23,27 & 28, 1998, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 103 TRANSC OF CLOSING ARGUMENTS, reported on 05/29/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 104 TRANSC OF TESTIMONY DAN E. FREEMAN, reported 05/20/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 105 TRANSC OF TESTIMONY RALPH DOLENCE, reported 05/21/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 106 TRANSC OF TESTIMONY MICHAEL PHY, reported 05/22/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 107 TRANSC OF TESTIMONY RUSSELL OGLE, reported 05/23/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cv103]

3/16/98 108 TRANSC OF TESTIMONY SANDY LAZAROWICZ, reported 05/27/97, bef Judge Webb (ak) [Entry date 03/17/98] [3:95cV103]

* * *

9/26/97 92 SUPERSEDEAS BOND ON STAY OF EXEC in amt of $ 600,575.42 filed by dfts Marley Company, Marley Electric Htg, United Dominion Ind, w/att POWER OF ATTY by Fed Ins Company of Warren, NJ, dated 09/11/97. Crt approval of bnd endorsed thereon 09/26/97. Bnd filed in compliance with crt order of 09/04/97, [89-1] (ak) [Entry date 09/29/97] (Edit date 09/29/97] [3:95cv1031

9/26/97 93 ORDER by Hon. Rodney S. Webb : re supersedeas bnd [92-1], crt having approved bnd, the execution of any procs to enforce jdmt is stayed pending appeal (cc: all counsel) (ak) [Entry date 09/29/97] [3:95cv103]

3/30/97 94 ORDER by Hon. Rodney S. Webb with NOTICE OF ENTRY endorsed as 10/01/97: approving Pla State Farm stip bill of costs [81-1], in amt of $12,631.19; the crt having rcvd no obj from Dft Marley. Said costs inserted on jdmt entered 06/17/97, [74-1]. (cc of order and revised Jdmt Doc #74 mailed to Attys Strandness, Dunn, Hill/Hogan) (ak) [Entry date 10/01/97] [3:95cv103]

10/2/97 95 NOTICE OF APPEAL to USCA8 by dfts Marley Company, Marley Electric Htg, United Dominion Ind from USDC final Jdmt [74-2], entered 06/17/97; from denial of mtn for dir verdict by dfts at close of all testimony on 05/28/97; and from Memorandum & Order entered 09/04/97 that den dfts' mtn for jdmt as matter of law, or alt, for new trial. App fee $105

pd by dfts. (ak) [Entry date 10/09/97] [3:95cv103]

10/2/97 96 RECEIPT #64227 - $105 APPEAL FEE pd by dfts (ak) [Entry date 10/09/97] [3:95cv103]

10/2/97 -- ORDER FOR APPELLATE TRANSCRIPT rcvd from dfts for various transcripts. Order presented to Crt Reptr Ketcham for ACK (ak) [Entry date 10/09/97] [3:95cv103]

10/10/97 -- REMARK - Copy of Ntc of App to Attys Strandness and Dunn for pla-appellee (ak) [3:95cv103]

10/10/97 97 Copy of doc entries as forwarded to counsel and USCA8 (ak) [3:95cv103]

10/10/97 -- 2 CERTIFIED and one pl copy of: NTC APP; JDMT; MEMORANDUM & ORDER deny post-jdmt mtns; SUPERSEDEAS BOND; Jury Verdict; and DOCKET ENTRIES, forwarded to USCA8, St. Paul Div office (ak) [3:95cv103]

10/10/97 98 ORDER FOR APPELLATE TRANSCRIPT filed by dfts, w/ACK by Crt Reptr Douglas T. Ketcham indicating completion date of Nov 28, 1997 for transcripts of FPT Cfr, Hrg on P/T mtns-05/16/97, and jury trial-05/19-29/97. (cc: All counsel, crt reptr and USCA8) (ak) [3:95cv103]

10/16/97 99 RECEIPT OF USCA8 for App-Rec forwarded 10/10/97 (ak)

TERMED

U.S. District Court
District of North Dakota (Southeastern)

CIVIL DOCKET FOR CASE #: 95-CV-104

State Farm Fire v. Marley Company, et al Filed: 07/31/95
Assigned to: Hon. Rodney S. Webb Jury demand: Both
Referred to: Hon. Karen K. Klein
Demand: $100,000 Nature of Suit: 385
Lead Docket: 95-CV-103 Jurisdiction: Diversity
Dkt # in lead : is 3:95-cv-00103

Cause: 28:1332 Diversity-Contract Dispute

STATE FARM FIRE & CASUALTY INSURANCE COMPANY plaintiff	Daniel J. Dunn [COR LD NTC] MARING WILLIAMS LAW OFFICE, PC PO BOX 2103 FARGO, ND 58107-2103 701-237-5297
v.	
MARLEY COMPANY, a Delaware corporation defendant	James S. Hill [COR LD NTC] ZUGER KIRMIS & SMITH 316 N 5 ST PO BOX 1695 BISMARCK, ND 58502-1695 701-223-2711

	Christine A. Hogan [COR LD NTC] ZUGER KIRMIS & SMITH PO BOX 1695 BISMARCK, ND 58502 701-223-2711
MARLEY ELECTRIC HEATING COMPANY, a Delaware corporation, and defendant	
UNITED DOMINION INDUSTRIES INC., a Delaware corporation defendant	James S. Hill (See above) [COR LD NTC]
	Christine A. Hogan (See above) [COR LD NTC]

7/31/95	1	COMPLAINT (Summons issued); jury demand (jo) [3:95cv104]
8/1/95	2	RECEIPT #1718 for $120 for payment rec'd yest. for filing fee (jo) [3:95cv104]
8/14/95	3	RETURN OF SERVICE executed upon defendant Marley Company, defendant United Dominion Ind on 8/4/95 Answer due 8/24/95 for United Dominion Ind, for Marley Electric Htg, NON EST as to Marley Electric Heating Company. (rh) [3:95cv104]

8/25/95 4 ANSWER by defendants Union Dominion Ind. and its subsidiary, the Marley Company to [1-1]; jury demand (jo) [3:95cv104]

9/19/95 5 ORDER by Hon. Karen K. Klein: Scheduling/discovery conference set for 10/26/95 at 10:10 AM (cc: all counsel) (lj) [3:95cv104]

9/28/95 6 WAIVER OF SERVICE upon defendant Marley Electric Htg on 9/25/95 Answer due 11/24/95 for Marley Electric Htg (seal) [3:95cv104]

10/26/95 7 CLERK'S MINUTES: of 16b Sched. Conf. before Hon. Karen K. Klein ; Scheduling conference held Oct. 26, 1995; crt has rec'd plan & approv'd same; no trial date or final p/t to be set; Atty Dunn has filed mtn to consolidate this case w/A3-95-103-Weisgram v. Marley Co.; Csnl would like early settl. conf.; Crt will set early sett. conf. for Sept. 27, 1996 in Fgo at 9:00 a.m.; Csnl est. trial no less than 5 days, no more than 10 days. (jo) [Entry date 10/31/95] [3:95cv104]

10/31/95 8 SCHEDULING ORDER Hon. Karen K. Klein; Discovery set for 10/1/96; dispositive motions due by 11/1/96 ; Motion to amend pleadings ddl 1/1/96; Expert report due 5/15/96 by deft's and plats have til 4/15/96; Expert witness ddl 5/1/96 by deft's and plats have til 4/1/96; Motion to join additional parties ddl 1/1/96; trial will be by jury & est. 10 days; Csnl suggesting a possible Consent to Proceed bef. Mag. Judge; w/ORDER ENDORSED THEREON APPROVING PLAN; (jo) [3:95cv104]

11/29/95 9 NOTICE of Setting: Jury trial scheduled for March 17, 1997 at 9:30 AM in Fargo bef Judge Webb; conference with court and counsel at 8:45 in LL Courtroom. Prop Jury Instructions to be filed 10 days prior to trial. Trial Est: 10 days (cc: all counsel, court officials) (mc) [3:95cv104]

12/5/95 10 ORDER by Hon. Karen K. Klein: settlement conference set for 9/27/96 at 9:00 AM, Judge's chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv104]

1/3/96 11 ORDER by Hon. Karen K. Klein: Final Pretrial conference set for 3/7/97 at 9:00 AM, chambers, US Crthse, Fargo (cc: all counsel) (lj) [3:95cv104]

1/24/96 12 MOTION by plaintiff, State Farm Ins. to consolidate case w/A3-95-103 (jo) [3:95cv104]

1/24/96 13 MEMORANDUM by plaintiffin support of motion to consolidate case w/A3-95-103 [12-1] w/att exhibits; (jo) [3:95cv104]

2/5/96 14 RESPONSE by deft Marley Electric Htg to motion to consolidate case w/A3-95-103 [12-1] (dj) [3:95cv104]

2/12/96 15 ORDER by Hon. Rodney S. Webb: granting motion to consolidate case w/A3-95-103 [12-1] 3:95-cv-104 being the member case and with lead case being 3:95-cv-103 Case consolidated for trial purposes (cc: all counsel) (jo) [Entry date 02/15/96] [Edit date 02/15/96] [3:95cv104]

2/15/96 -- REMARK - ALL FURTHER DOCKETING SHOULD BE DOCKETED IN A3-95-103-LEAD CASE (jo) [3:95cv104]

7/9/96 16 NOTICE of Setting: Jury trial prev. scheduled for March 17, 1997 is resched to 02/24/97at 9:30 a.m. bef. Judge Webb in FGO; conf w/counsel at 8:45 in LL Courtroom; Prop Jury Instr to be filed 10 days prior to trial; TRIAL EST:10 days (cc: all counsel, court officials) (td) [3:95cv104]

9/18/96 17 NOTICE of Setting: Final Pretrial conference rescheduled for 2/3/97 at 1:30 PM bef Judge Klein in Fargo (reset to be held along with 3:95cv103) (cc: all counsel, court officials) (lj) [3:95cv104]

1/27/97 -- Docket Modification (Utility Event) ; Pretrial conference reset for 5/2/97 ; Jury trial reset for 5/19/97 (sb2) [3:95cv104]

6/17/97 18 JUDGMENT: with NOTICE OF ENTRY: that pla State Farm Fire and Casualty Insurance Company, have judgment against dfts in the sum of $100,575.42, w/o int. terminating case (cc: all counsel) (NOTE: See also A3-95-103) (dj) [3:95cv104]

UNITED STATES DISTRICT COURT
FOR THE STATE OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Civil Action No. A3-95-103

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,

Plaintiff,

COMPLAINT AND JURY DEMAND

vs.

Marley company, a Delaware Corporation, and its subsidiary, Marley Electric Heating Company, a Delaware Corporation, and United Dominion Industries, Inc. a Delaware Corporation.

Defendants.

COME NOW the Plaintiffs and for their came of action, state and allege:

I.

That the court has jurisdiction pursuant to 28 U.S.C. 1332 in that the amount in controversy exceeds $50,000.00 and that the parties are citizens of different states; that complete diversity exists between the Plaintiffs and Defendants herein.

II.

That at all times relevant herein, decedent Bonnie J. Weisgram and Plaintiff Chad Weisgram were residents of the State of North Dakota.

III.

That at all times relevant herein, Defendant Marley Electric Heating Company was a Delaware Corporation with its principal place of business in the state of South Carolina.

IV.

That at all times relevant herein, Defendant Marley Company is a Delaware Corporation with its principal place of business in the state of Kansas.

V.

That at all times relevant herein, Defendant Marley Electric Heating Company was owned and or controlled by Marley Company so as to render it liable for Defendant Marley Electric Heating Company conduct.

VI.

That at all times relevant herein, Defendant United Dominion Industries, Inc. is a Delaware Corporation with its principle place of business in the state of North Carolina.

VII.

That at all times relevant herein, Defendant United Dominion Industries, Inc. exercised ownership and or control

over Defendant Marley Company and or Defendant Marley Electric Heating Company so as to render it liable for Defendant Marley Electric Heating Company's conduct.

VIII.

That at all times relevant herein, Defendants were in the business of designing, manufacturing, distributing, and selling an electric baseboard heater known as Model No. MBB2-52, in the State of North Dakota and elsewhere.

IX.

That on December 30, 1993, as a direct and sole result of the Defendants' negligence in the design, testing, manufacturing, distributing, warning and sale of the above-described heater when it was in a defective and unsafe condition, the aforemention electric baseboard heater caused a fatal fire in the home of the decedent Bonnie J. Weisgram, located at 2411 Flickertail Drive North, in the City of Fargo, State of North Dakota; that Defendants were otherwise negligent.

X.

That at the time said heater was manufactured, distributed and sold by the Defendants, said Defendants warranted, both expressly and by implication, that said product was fit for the purposes for which it was manufactured, and was of merchantable quality; that on the contrary, said heater was unfit for the purposes for which it was designed, manufactured and sold, was not of merchantable quality and as a result, Defendants breached its express and implied warranties, resulting in the death of Bonnie J. Weisgram and damage to Plaintiff Chad Weisgram as hereinbefore set forth.

XI.

That as a result of the aforementioned, Bonnie J. Weisgram was killed by the fire and Plaintiff Chad Weisgram, individually and on behalf of the heirs of Bonnie J. Weisgram, was caused to suffer damages in an amount in excess of Fifty Thousand and no/100ths ($50,000.00) Dollars as provided for in §32-21-02 and §32-03.2-04 of the North Dakota Century Code.

XII.

That Plaintiff demands a trial by jury.

WHEREFORE, Plaintiff demands judgment against the Defendants, and each of them, for an amount in excess of Fifty Thousand ($50,000.00) and no/100ths Dollars, exclusive of costs and disbursements incurred herein.

Dated: 7-31-95 ECKMAN, STRANDNESS & EGAN, P.A.

/s/

Paul A. Strandness
Attorney ID #106240
501B Butler Square
100 North Sixth Street
Minneapolis, Minnesota 55403
(612) 338-6565

and

ANDERSON & BAILLY

/s/

Gregory L. Thompson
State Bank Center, Suite 202
3100 13th Avenue SW
P.O. Box 10247
Fargo, North Dakota 58106-0247
701/235-3300

ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiffs,	)	
vs.	)	**COMPLAINT AND DEMAND FOR JURY TRIAL**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

For its cause of action against the Defendants, State Farm Fire & Casualty Insurance Company (State Farm) states and alleges as follows:

I.

The Court has jurisdiction over these proceedings pursuant to 28 U.S.C. § 1332 as the amount in controversy exceeds Fifty Thousand and 00/100 Dollars ($50,000.00), and the parties are citizens of different states. There is complete diversity of citizenship between the Plaintiff and Defendants herein.

II.

At all times relevant to these proceedings, Plaintiff State Farm was a citizen and resident of the State of Illinois.

III.

At all times relevant to these proceedings, Defendant Marley Company was a Delaware corporation with its principal place business in the State of Kansas.

IV.

At all times relevant to these proceedings, Defendant Marley Electric Heating Company was a Delaware corporation with its principal place of business in the State of South Carolina.

V.

At all time relevant to these proceedings, Defendant United Dominion Industries, Inc. was a Delaware corporation with its principal place of business in the State of North Carolina.

VI.

At all times relevant to these proceedings, Defendant Marley Company owned and/or controlled Defendant Marley Electric Heating Company so as to render it liable for Defendant Marley Electric Heating Company's negligent or otherwise wrongful conduct.

VII.

At all times relevant to these proceedings, Defendant United Dominion Industries, Inc. exercised ownership and/or control over Defendant Marley Company and/or Defendant Marley Electric Heating Company so as to render it liable for the negligent or otherwise wrongful conduct of Defendant Marley Company and Defendant Marley Electric Heating Company.

VIII.

At all times relevant to these proceedings, the Defendants were in the business of designing, manufacturing, distributing and selling an electric baseboard heater with a model number MBB2-52 in the State of North Dakota and elsewhere.

IX.

A model number MBB2-52 electric baseboard heater was installed in the home of Bonnie Weisgram.

X.

As a direct and proximate result of the Defendants' negligence in the design, testing, manufacturing, distributing, warning and/or sale of the aforementioned electric baseboard heater, a fire occurred at a home owned by Bonnie Weisgram and located at 2411 Flickertail Drive South in the City of Fargo, State of North Dakota, on December 30, 1993.

XI.

The aforementioned fire was caused by a defective and unsafe component or condition within the electric baseboard heater sold by the Defendants.

XII.

At the time the aforementioned electric baseboard heater was manufactured, distributed and sold by the Defendants, said Defendants warranted, both expressly and by implication, that the electric baseboard heater was fit for the purposes for which it was manufactured and was of merchantable quality.

XIII.

At the time the aforementioned electric baseboard heater was manufactured, distributed and sold by the Defendants, said heater was unfit for the purposes for which it was manufactured and was not of merchantable quality. As a result thereof, the Defendants breached the express and implied warranties for the product.

XIV.

As a result of the Defendants' negligence and breach of express and implied warranties, the aforementioned fire destroyed the home located at 2411 Flickertail Drive South, as well as the contents therein. The fire further damaged the structure and contents of the adjacent home owned by Catherine Ferguson located at 2413 Flickertail Drive South in Fargo, North Dakota.

XV.

Plaintiff State Farm provided homeowners' insurance to Bonnie Weisgram's home located at 2411 Flickertail Drive South. Further, State Farm assumed responsibility for the damage caused to Catherine Ferguson's home located at 2413 Flickertail Drive South.

XVI.

As a direct and proximate result of the negligence and breach of express and implied warranties, Plaintiff State Farm, pursuant to its contractual obligations, was compelled to pay for the damages to the aforementioned homes and the contents therein in the amount of One Hundred Thousand Five Hundred Seventy-Five and 42/100 Dollars ($100,575.42).

XVII.

Plaintiff State Farm is entitled to subrogation and/or reimbursement in the amount of One Hundred Thousand Five Hundred Seventy-Five and 42/100 Dollars ($100,575.42) for the property damage caused by the defective and unsafe electric baseboard heater which resulted in the fire.

XVIII.

Plaintiff State Farm reserves the right to raise additional claims and allegations developed during the discovery phase of this lawsuit.

THE PLAINTIFF DEMANDS A TRIAL BY JURY

WHEREFORE, Plaintiff State Farm Fire & Casualty Insurance Company demands judgment against the Defendants, and each of them, in the amount of one Hundred Thousand Five Hundred Seventy-Five and 42/100 Dollars ($100,575.42), its costs and disbursements herein, and such other and further relief as is just and proper.

Dated this 31st day of July, 1995.

CAHILL & MARQUART, P.A.

By /s/
Daniel J. Dunn
Attorneys for Plaintiff
403 Center Avenue
P.O. Box 1238
Moorhead, MN 56561-1238
Telephone: (218) 236-4900
North Dakota License No: 50302

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

Defendant, United Dominion Industries, Inc., a Delaware corporation, on its own behalf and on behalf of its wholly-owned subsidiary, The Marley Company, for its Answer to Plaintiff's Complaint, states:

I.

Denies all allegations except those admitted, qualified, or otherwise explained in this Answer.

II.

Admits The Marley Company ("Marley") is a wholly-owned subsidiary of United Dominion Industries, Inc.,

("United Dominion"), a Delaware corporation, and states that Marley Electric Heating Company ("Marley Electric"), incorrectly designated in the Complaint as a Delaware corporation, is an unincorporated division of United Dominion.

III.

Admits the allegations in paragraphs I and V of the Complaint, and admits that Defendant United Dominion, through its division, Marley Electric, is in the business of designing, manufacturing, distributing, and selling electric baseboard heaters for use in North Dakota and elsewhere.

IV.

Admits that a fire occurred late on December 29, 1993, or early in the morning on December 30, 1993, at a home owned by Bonnie Weisgram, located at 2411 Flickertail Drive North in the City of Fargo, North Dakota.

V.

Admits that the electric baseboard heater described in paragraph IX was manufactured by Marley Electric.

VI.

The subject electric baseboard heater, when it left the possession and control of Marley Electric, was free of design and manufacturing defects, was reasonably fit for the purpose for which it was designed and intended, was of merchantable quality and was not unreasonably dangerous when prudently used for its intended purpose.

VII.

Denies that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the subject electric baseboard heater and denies that the heater was the cause or origin of the fire described in paragraph X of the complaint, and further denies that the heater malfunctioned or failed.

VIII.

Alleges that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the fault or negligence of decedent Bonnie Weisgram and of others over whom this Defendant had no control or right of control.

IX.

The subject electric baseboard heater was designed, manufactured, tested, and assembled with reasonable care and met or exceeded all applicable state and federal safety standards and all applicable industry standards.

X.

Denies breach of any express or implied warranties of fitness or merchantability. Plaintiff's State Farm's damages were caused, contributed to, or enhanced by unforeseeable misuse or alteration of the product or other factors unknown at this time.

XI.

The Complaint fails to state a claim against Defendant upon which relief can be granted.

XII.

Plaintiff's cause of action is barred by the applicable statutes of limitations and repose.

XIII.

Paragraph XVIII in the Complaint violates the Federal Rules of Civil Procedure in respect to amendment of pleadings, and Defendant moves to strike it.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**AFFIDAVIT OF SERVICE**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

I hereby certify that pursuant to the Local Rules of the United States District Court for the District of North Dakota, on August 23, 1995, I caused to be served:

1. ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND

By mailing true and correct copies to the following:

Daniel J. Dunn
Attorney at Law
P.O. Box 1238
Moorhead MN 56561-1238

/s/
James S. Hill

Subscribed and sworn to before me on August 23, 1995.

/s/
Carol Knudtson
Burleigh County, North Dakota
My Commission Expires: 5/22/98

UNITED STATES DISTRICT COURT
FOR THE STATE OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	Civil Action No: A3-95-103
Plaintiff,	)	
vs.	)	**AMENDED ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY AND JURY DEMAND**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

COMES NOW the Defendant, United Dominion Industries, Inc., a Delaware corporation, on its own behalf and on behalf of its wholly-owned subsidiary, The Marley Company, for its Amended Answer to Plaintiff's Complaint, states:

I.

Denies all allegations except those admitted, qualified, or otherwise explained in this Amended Answer.

II.

Admits The Marley company is a wholly-owned subsidiary of United Dominion Industries, Inc., a Delaware corporation, and states that Marley Electric Heating company, incorrectly designated as a Delaware corporation in the Complaint, is an unincorporated division of United Dominion.

III.

Admits the allegations in paragraphs I and VI of the Complaint, and admits that Defendant United Dominion Industries, Inc. ("United Dominion") through its division, Marley Electric Heating Company ("Marley Electric"), is in the business of designing, manufacturing, distributing, and selling electric baseboard heaters for use in North Dakota and elsewhere.

IV.

Admits that Plaintiff's decedent, Bonnie J. Weisgram, died as a result of a fire that occurred late on December 29, 1993, or early in the morning on December 30, 1993, at her home located at 2411 Flickertail Drive North in the City of Fargo, North Dakota.

V.

Admits that the electric baseboard heater described in paragraph IX of the Complaint was manufactured by Marley Electric.

VI.

The subject electric baseboard heater was free of design and manufacturing defects when it left the possession and control of Marley Electric, was reasonably fit for the purpose for which it was designed and intended, was of merchantable quality and was not unreasonably dangerous when prudently used for its intended purpose.

VII.

Denies that Plaintiff's damages were caused, contributed to, or enhanced by the subject electric baseboard heater and denies that said heater was the cause or origin of the fire described in the Complaint, or that it failed or malfunctioned as alleged in the Complaint.

VIII.

Bonnie Weisgram's fatal injuries were caused, contributed to, or enhanced by her own fault or negligence, including intoxication, drug use, and otherwise negligent or reckless conduct.

IX.

Any instructions for use, directions, or warning that may have been provided by the Defendant were reasonable and adequate.

X.

Plaintiff's decedent assumed the risk of injury and caused, contributed to, or enhanced plaintiff's damages by unforeseeable misuse or alteration of the product.

XI.

The subject electric baseboard heater was designed, manufactured, tested, and assembled with reasonable care and met or exceeded all applicable state and federal safety standards and all applicable industry standards.

XII.

The Complaint fails to state a claim against Defendant upon which relief can be granted.

XIII.

Plaintiff's cause of action is barred by the applicable statutes of limitations and repose.

WHEREFORE, Defendant requests the Plaintiff's Complaint be dismissed with prejudice, and that Defendant have its cost and disbursements according to law.

Dated this 30th day of August, 1995.

BY:/s/_____

James S. Hill
Christine A. Hogan
ZUGER KIRMIS & SMITH
Attorneys for Defendant
316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502-1695

Demand for Trial by Jury

Defendant demands a jury trial and requests a jury of twelve persons.

Dated this 30th day of August, 1995.

BY:/s/_____

James S. Hill
Christine A. Hogan
ZUGER KIRMIS & SMITH
Attorneys for Defendant
316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502-1695

STATE OF NORTH DAKOTA)
) ss. **AFFIDAVIT OF**
COUNTY OF BURLEIGH) **MAILING**

The undersigned, being first duly sworn, says that: I am a United States citizen, over the age of eighteen years on August 30, 1995, I served a copy of the attached

AMENDED ANSWER OF UNITED DOMINION INDUSTRIES INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY AND JURY DEMAND

by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota.

Paul A. Strandness
Attorney at Law
501B Butler Square
100 North Sixth Street
Minneapolis, MN 55403

Gregory L. Thompson
Attorney at Law
State Bank Center, Suite 202
3100 13th Avenue SW
P.O. Box 10247
Fargo, ND 58106-0247

Daniel J. Dunn
Cahill & Marquart
403 Center Avenue
P.O. Box 1238
Moorhead, MN 56561-1238

/s/ Lynette D. Sawatztse

Subscribed and sworn to before me
today, August 30, 1995.

/s/ Karol A. Cossette
Notary Public, State of North Dakota
My Commission Expires: 9-28-99

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

Defendant, United Dominion Industries, Inc., a Delaware corporation, on its own behalf and on behalf of its wholly-owned subsidiary, The Marley Company, for its Answer to Plaintiff's Complaint, states:

I.

Denies all allegations except those admitted, qualified, or otherwise explained in this Answer.

II.

Admits The Marley Company ("Marley") is a wholly-owned subsidiary of United Dominion Industries, Inc.,

("United Dominion"), a Delaware corporation, and states that Marley Electric Heating Company ("Marley Electric"), incorrectly designated in the Complaint as a Delaware corporation, is an unincorporated division of United Dominion.

III.

Admits the allegations in paragraphs I and V of the Complaint, and admits that Defendant United Dominion, through its division, Marley Electric, is in the business of designing, manufacturing, distributing, and selling electric baseboard heaters for use in North Dakota and elsewhere.

IV.

Admits that a fire occurred late on December 29, 1993, or early in the morning on December 30, 1993, at a home owned by Bonnie Weisgram, located at 2411 Flickertail Drive North in the City of Fargo, North Dakota.

V.

Admits that the electric baseboard heater described in paragraph IX was manufactured by Marley Electric.

VI.

The subject electric baseboard heater, when it left the possession and control of Marley Electric, was free of design and manufacturing defects, was reasonably fit for the purpose for which it was designed and intended, was of merchantable quality and was not unreasonably dangerous when prudently used for its intended purpose.

VII.

Denies that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the subject electric baseboard heater and denies that the heater was the cause or origin of the fire described in paragraph X of the complaint, and further denies that the heater malfunctioned or failed.

VIII.

Alleges that Plaintiff's State Farm's damages were caused, contributed to, or enhanced by the fault or negligence of decedent Bonnie Weisgram and of others over whom this Defendant had no control or right of control.

IX.

The subject electric baseboard heater was designed, manufactured, tested, and assembled with reasonable care and met or exceeded all applicable state and federal safety standards and all applicable industry standards.

X.

Denies breach of any express or implied warranties of fitness or merchantability. Plaintiff's State Farm's damages were caused, contributed to, or enhanced by unforeseeable misuse or alteration of the product or other factors unknown at this time.

XI.

The Complaint fails to state a claim against Defendant upon which relief can be granted.

XII.

Plaintiff's cause of action is barred by the applicable statutes of limitations and repose.

XIII.

Paragraph XVIII in the Complaint violates the Federal Rules of Civil Procedure in respect to amendment of pleadings, and Defendant moves to strike it.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiff,	)	
v.	)	**AFFIDAVIT OF SERVICE**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

I hereby certify that pursuant to the Local Rules of the United States District Court for the District of North Dakota, on August 23, 1995, I caused to be served:

1. ANSWER OF UNITED DOMINION INDUSTRIES, INC. AND ITS SUBSIDIARY, THE MARLEY COMPANY, AND JURY DEMAND

By mailing true and correct copies to the following:

Daniel J. Dunn
Attorney at Law
P.O. Box 1238
Moorhead MN 56561-1238

/s/
James S. Hill

Subscribed and sworn to before me on August 23, 1995.

/s/
Carol Knudtson
Burleigh County, North Dakota
My Commission Expires: 5/22/98

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Plaintiff, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-103 **ORDER GRANTING MOTION TO CONSOLIDATE**

State Farm Fire & Casualty Insurance Company, Plaintiffs, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-104

State Farm Fire & Casualty Insurance Company brought a motion for consolidation of Case Nos. A3-95-103 and A3-95-104 for purposes of trial. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, does not oppose the motion to consolidate. Chad Weisgram, individually, and on behalf of the heirs of Bonnie Jo Weisgram, decedent, has not filed a response to the motion to consolidate.

Based upon Rule 42(a) of the Federal Rules of Civil Procedure, the applicable case law and the positions and arguments of the parties, the Court hereby grants State Farm's motion to consolidate Case Nos. A3-95-103 and A3-95-104 for trial purposes.

Dated this 12th day of February, 1996.

/s/
Rodney S. Webb
Chief Judge of U. S. District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	Civil No: A3-95-103
Plaintiff,	)	
vs.	)	**PRETRIAL STATEMENT**
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

State Farm Fire & Casualty Insurance Company,	)	Civil No: A3-95-104
Plaintiffs,	)	
vs.	)	
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

A final pretrial conference was held on the 2nd day of May, 1997.

Appearing for the parties as counsel were: Dan Dunn for Plaintiff, State Farm; Paul Strandness for Plaintiff, Weisgram; James S. Hill and Christine Hogan for Defendant, Marley Company.

1. Exhibit List: A list of the exhibits to be offered by the parties is attached to this Order, including a "will offer" or "may offer" designation.

2. Foundation of Exhibits: Foundation for the following exhibits has been stipulated or waived:

Plaintiffs waive foundation for defendant's exhibits, except nos. 238, 239, 246, 407, and 426.

Plaintiffs do not waive foundation with respect to demonstrative and illustrative exhibits referred to in Exhibit List.

Defendant waives foundation for plaintiff's exhibits, excepting exhibit nos. 141, 152, and 194-205.

3. Uncontroverted Facts: The parties have agreed that the following may be accepted as established facts for purposes of this case only: A fire occurred at the Bonnie Weisgram home on December 30, 1993. Bonnie Weisgram died as a result of that fire.

4. Controverted and Unresolved Issues: The issues remaining to be determined and unresolved matters for the Court's attention are:

a. Plaintiffs allege that the fire was caused by a defective and unreasonably dangerous baseboard heater manufactured by BERKO, a predecessor of

Marley Company. Defendants deny that the baseboard heater caused the fire.

b. The parties have brought the following motions, which are currently pending response from the other party:
   1. Defendant's motion to preclude John Gorman from testifying on the ground that plaintiffs failed to comply with Rule 26;
   2. Plaintiff's motion to limit testimony by Dr. Paul Larsen;
   3. Plaintiff's motion to compel production of CPSC documents;

c. Defendant anticipates filing the following pre-trial motions:
   1. Rule 702 motion to preclude Ralph Dolence, John Gorman, and Sandy Lazarowicz from testifying on ground that their opinions are not grounded in science or engineering;
   2. Motion to dismiss breach of warranty claims on ground that statute of limitations for warranties has expired under UCC;
   3. Motion in limine to preclude reference to CPSC investigation of unrelated model Marley heater and to preclude any reference to Marley recall of unrelated model heater;
   4. Motion to dismiss warnings claim, manufacturing defect claim and design defect claim based on plaintiffs failure to comply with Rule 26;

d. Plaintiff anticipates filing the following pre-trial motions:
   1. Rule 702 motion to preclude testimony of Russell Ogle and Robert Carbonara on the ground that their opinions are not based on science or engineering; and

   2. Motion to exclude testimony of Richard Moore based upon late disclosure of opinions and supporting documentation.

5. All witnesses, other than experts, to be called to testify by plaintiffs, except those who may be called for rebuttal purposes only, are:

WILL CALL:

Chad Weisgram, Fargo, ND
Ryan Weisgram, Fargo, ND
Merle Higgs, 2531 Willow Road, Fargo, ND
Ila Law, Fargo, ND
Karen Eisenstadt, Fargo, ND
Dr. Ron E. Wiisanan, Deputy Coroner, Cass County, Fargo, ND
Dr. Robert F. Startz, Pathologist, Dakota Hospital, Fargo, ND
Cpt. Jerry Splitt, Fargo Fire Department, Fargo, ND
Joe Locnikar, off duty fireman neighbor, Fargo, ND
Fireman Roger Thorseth, Fargo Fire Department, 637 NP Avenue, Fargo, ND
Fireman Marshall Forness, Fargo Fire Department, 637 NP Avenue, Fargo, ND
Gene Okerlund, Music Director, Fargo Schools, Fargo, ND
Ron Messelt, 3118 Edgewood Drive, Fargo, ND
Captain D.E. Freeman, Fargo Fire Department Fargo, ND

MAY CALL:

Joe Weisgram, Fargo, ND
Leslie Tuftee, Sioux Falls, SD
Craig Hanson, Fargo, ND
Dr. John R. Baird, County coroner, Cass County, Fargo, ND

Dr. Robert F. Startz, Pathologist, Dakota Hospital, Fargo, ND
Ambulance Attendant Todd Horhut and J. Gross and G. Casey
Sgt. Steve Link, Fargo Fire Dept., Fargo, ND
Robert Keller, 2308 Flickertail Drive N, Fargo, ND
Gary Anderson, Fargo Police Officer No. 044
Catherine Ferguson, Fargo, ND, Owner of next-door duplex
Ted Cyptar, representative, agent or employee of Marley Electric
Employees, officers and/or agents of Gary's Electric, Fargo, ND
Mary Larson, Property Management agent Fargo, ND

All witnesses, other than experts, to be called to testify by defendant, except those listed in the preceding paragraph as expected to be called by the plaintiffs and except those who may be called for rebuttal purposes only, are:

MAY CALL:

Donald Clapp, Fargo, ND, original owner of Weisgram property
Kathryn Fergussen, Fargo, ND, owner of next-door duplex
John Fritz, Fritz Electric Company, Fargo, ND, installed subject heater in Weisgram home
Michael Loescher, Director of Engineering, Sunne Controls, Portland, OR, representative of thermostat manufacturer

It is understood that except upon a showing of good cause, no witness whose name and address does not appear

herein shall be permitted to testify over objection for any purpose except rebuttal.

6. Expert Witnesses:

The expert witnesses to be called by plaintiffs are:

WILL CALL:
John Gorman
Lowell Van Berkom
Dr. Ron E. Wiisanan, Deputy Coroner, Cass County, Fargo, ND

MAY CALL:

Dr. Robert F. Startz, Pathologist, Dakota Hospital, Fargo, ND
Dr. John R. Baird, County Coroner, Cass County, Fargo, ND

WILL CALL:
Ralph Dolence
Dolence Electric Technical Consultants
P.O. Box 5207
Willowick, OH 44095
Fire cause and origin expert, Ralph Dolence will testify that the baseboard heater in Bonnie Weisgram's home caused the fire at issue.

WILL CALL:
Sandy J. Lazarowicz
IQT Group Inc.
6363 Michael Drive
Brook Park, OH 44142-3813
Metallurgist

Sandy Lazarowicz will testify that the baseboard heater in Bonnie Weisgram's home caused the fire at issue

The expert witnesses to be called by defendant are:

WILL CALL:

a. Michael R. Phy, Senior Engineering Specialist, Product Safety, Marley Electric Heating
b. Dr. Russell Ogle, Chemical Engineer, Packer Engineering
c. Gordon Wells, Engineer, Therm-O-Disc, Inc.
d. Vincent Acampora, Mechanical Engineer, C & K Components, Inc.
e. Richard Moore, Physicist, Product Performance Manager, C & K Components, Inc.

MAY CALL:

f. Matthew Miner, Engineer, Energy Converters Inc.
g. Dr. Robert Carbonara, Metallurgy, S.E.A., Inc.
h. Dr. Alphonse Poklis, Toxicology, Medical College of Virginia.
i. Dr. Paul Larsen, Medical Doctor, previously listed in plaintiff's expert disclosure, plaintiff's treating physician.

7. Discovery Materials:

Plaintiff's plan to offer:

Marley Company's Response to State Farm's Request for Admission
Defendant's Response to Plaintiffs Interrogatories dated 12/1/95
Defendant's Response to Plaintiff s Interrogatories (Set II) dated 12/12/96
Defendant's Disclosure of Expert Witness Reports dated 5/31/96

Defendant's plan to offer:

Defendant does not plan to offer any discovery materials at this time.

8. Trial of this case will be by jury.

9. Length of trial is estimated to be 10 days.

10. The parties will not voluntarily waive their rights to proceed before a district judge.

ORDER

The foregoing Pretrial Statement is adopted as the order of the Court.

DATED this 15th day of May, 1997.

BY THE COURT:

/s/
Karen K. Klein
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Plaintiff, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-103 **REQUEST FOR HEARING TO EXCLUDE THE EXPERT TESTIMONY OF JOHN GORMAN, RALPH DOLENCE, AND SANDY LAZAROWICZ UNDER RULE 702**
State Farm Fire & Casualty Insurance Company, Plaintiffs, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United	)	Civil No: A3-95-104

Dominion Industries, Inc., a)
Delaware corporation,)
)
Defendants.)

Defendant Marley requests that this court hold a hearing under Federal Evidence Rule 104 on the preliminary question of whether plaintiff's experts Dolence, John Gorman, and Sandy Lazarowicz should be allowed to testify on the ground that their opinions are not based on science or engineering, are untested, and are speculative. Under *Daubert v. Merill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993),* the United State Supreme Court held that there has to be a threshold level of scientific merit to expert opinion testimony in product liability trials. In this case, the proposed expert testimony by plaintiff's technical experts has no foundation of scientific methodology and no record of valid, repeatable testing for the opposing party to examine, test, and hold up to the light. Under these circumstances, this court should reject the testimony at the threshold under Rule 702.

DATED this 15th day of May, 1997.

Respectfully submitted by:

ZUGER KIRMIS & SMITH
Attorney for Defendants
316 North 5th Street, 6th Floor
P.O. Box 1695
Bismarck, N.D. 58502
Phone: (701) 223-2711

By /s/ Christine Hogan
James S. Hill (#3158)
Christine A. Hogan (#3259)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually)
and on behalf of the heirs of)
Bonnie Jo Weisgram,)
decedent,)
)
Plaintiff,)
)
-vs-) CIVIL NO. A3-95-103
)
Marley Company, a Delaware)
corporation, and its subsidiary,)
Marley Electric Heating)
Company, a Delaware)
corporation, and United)
Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

State Farm Fire & Casualty)
Insurance Company,)
)
Plaintiffs,)
)
-vs-) CIVIL NO. A3-95-104
)
Marley Company, a Delaware)
corporation, and its subsidiary,)
Marley Electric Heating)
Company, a Delaware)
corporation, and United)

Dominion Industries, Inc., a)
Delaware corporation,)
)
Defendants.)

ORDER

Before the court are several motions, each of which will be addressed in turn.

The first motion before the court is plaintiff Weisgram's motion in limine to exclude the opinion of Dr. Paul D. Larsen regarding the cause of the decedent's death (docket #29). Plaintiff argues that Dr. Larsen, who was the decedent's treating physician, is not qualified to render forensic opinions regarding the cause of decedent's death. Defendants respond by arguing that Dr. Larsen is qualified to render such opinions. The court notes that Dr. Larsen is not on the "Will Call" list of witnesses in the final pretrial statement (docket #52). Therefore, a ruling on this motion will be reserved until such time as it is necessary for the court to consider it.

The next motion before the court is defendants' motion in limine to prohibit duplicate arguments and examinations by the separate plaintiffs (docket #47). The thrust of the defendants' argument is that plaintiff State Farm is not entitled to separately examine witnesses and make arguments because: 1) the cases of each of the plaintiffs were consolidated upon State Farm's motion; 2) State Farm holds a subrogation interest only and the amount of that interest has been stipulated to by the parties; and 3) State Farm makes no allegations separate from the Weisgrams and its right of recovery is therefore dependent on the recovery of the Weisgrams. The plaintiffs respond by noting that motions in limine were required to be filed 30 days before trial and the defendants' motion, filed less than one week before trial, is late and therefore should be denied. The court finds that the

defendants' motion is tardy and is therefore **DENIED**. However, pursuant to Rule 611 of the Federal Rules of Evidence, the court will not allow plaintiffs to conduct repetitive examinations of witnesses. Furthermore, the court will restrict the total time for opening statements at one hour for both of either will call or may call during this trial. Specifically, the plaintiffs have jointly listed a total of seven experts and defendants have listed a total of nine experts. It is the court's initial impression that sixteen experts are unnecessary and will likely be repetitive. It is the court's hope that the parties will be selective in their presentation of expert testimony as unduly repetitious testimony is undesirable and will not be permitted.

The final motion before the court is defendants' motion and request for a hearing to exclude the testimony of John Gorman, Ralph Dolence, and Sandy Lazarowicz pursuant to Rule 702 of the Federal Rules of Evidence. According to defendants, the opinions of the named experts are not based on science or engineering, are untested, and are speculative. Therefore, according to defendants, the opinions do not meet the standard of admissibility outlined in Rule 702 and Daubert v. Merill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The court is of the opinion that the defendants' motion is untimely and is therefore **DENIED**. The court will, however, make Rule 702 determinations during trial as testimony and qualifications of experts are presented and will entertain qualification challenges and requests for Daubert hearings upon proper objection.

IT IS SO ORDERED.

Dated this 20th day of May, 1997.

/s/
Rodney S. Webb, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	
Plaintiff,	)	
-vs-	)	CIVIL NO. A3-95-103
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

State Farm Fire & Casualty Insurance Company,	)	
Plaintiffs,	)	
-vs-	)	CIVIL NO. A3-95-104
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware	)	

corporation, and United)
Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

INSTRUCTIONS TO THE JURY

FINAL INSTRUCTIONS

The Honorable Rodney S. Webb
United States District Court

May 29, 1997

Final Instructions

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9.	Proof of Defect
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18. Consideration of Damages

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	
Plaintiff,	)	
-vs-	)	CIVIL NO. A3-95-103
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,	)	
Defendants.	)	

State Farm Fire & Casualty Insurance Company,	)	
Plaintiffs,	)	
-vs-	)	CIVIL NO. A3-95-104
Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United	)	

Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

FINAL INSTRUCTIONS

Jury Instruction 1

Introduction

MEMBERS OF THE JURY:

Now that you have heard the evidence, it becomes my duty to give you the final instructions concerning the law applicable to this case.

It is your duty as jurors to follow the law as stated in these instructions, as well as those I gave you earlier, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case and the law as I give it to you.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in these instructions.

These final instructions, as well as those I gave you before you began hearing evidence, are in writing and will be available to you in the jury room. Remember, though, all

instructions I have given you during the course of the trial, whether in writing or not, must be followed.

Jury Instruction 2

FIND

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

Jury Instruction 3

PRESUMPTION

In these instructions I will refer to presumptions.

A presumption is an inference of the existence of a fact not certainly known, which the law expressly directs to be drawn from particular known facts or circumstances. If facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the presumed fact and governs you in finding the facts unless you find from credible evidence that the presumed fact does not exist, in which event the presumption is rebutted and ceases to operate.

A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Jury Instruction 4

FAILURE TO PRODUCE EVIDENCE

If a party has failed to offer evidence under that party's control which is (1) available to the party by the exercise of reasonable diligence, (2) the evidence was not equally available to the adverse party, (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if the person had reason to believe it to be favorable, and (4) no reasonable explanation for that failure is given, you may infer that the evidence would have been unfavorable to that party.

Jury Instruction 6

STATEMENT OF DEFENSES AND ISSUES TENDERED BY DEFENDANTS

Defendants deny that the electric baseboard heater was defective or unreasonably dangerous by virtue of its design, or otherwise, when it left their hands.

Defendants further contend that the fire in the Weisgram home was caused by a means other than the heater and that Bonnie Weisgram was at fault for her own death. The defendants contend that the sole cause of the fire in the Weisgram home was a cigarette dropped between sofa cushions. As indicated to you in Preliminary Instruction No. 5, the defendants have the burden of proving their defenses by a "preponderance of the evidence."

I will now instruct you on the law as it applies to the plaintiff's claims, and the defenses raised by the defendants.

STRICT PRODUCTS LIABILITY

A person who manufactures a product that is defective and unreasonably dangerous is liable to the user or consumer of the product for physical harm to the person resulting from any ordinary use of the product for which it was designed, or which could have been reasonably anticipated, by the manufacturer if the manufacturer: (1) is engaged in the business of manufacturing the product, and (2) expects the product to be used by the user or consumer without substantial change in the condition in which it was sold.

This rule of strict liability applies even though the manufacturer exercised all possible care in the manufacture of the product and the user or consumer did not buy the product from or enter into any contractual relation with the manufacturer.

Before you can find the manufacturer liable, you must find that the product in question was defective when it left the possession of the manufacturer and that it was unreasonably dangerous to the plaintiff.

A defective product is unreasonably dangerous if any ordinary use of the product for which it was designed, or use that was anticipated by the manufacturer, creates a substantial risk of physical harm to the user or consumer beyond any danger that would be contemplated by the ordinary and prudent buyer, consumer or user of the product in that community considering the product's characteristics, propensities, risks, dangers and uses, together with an actual knowledge, training or experience possessed by that particular buyer, user or consumer.

PROOF OF DEFECT

Conclusive proof is not necessary to show the existence of a product defect. A product defect can be shown by circumstantial evidence. It is not enough to show that an accident or mishap occurred to establish a defect, but the nature of the defect need not be precisely established. A defect may be inferred from proof that the product did not perform as intended by the manufacturer. However, a product is not defective or unreasonably dangerous merely because it is possible to be injured while using it.

Jury Instruction 10

MANUFACTURER NOT GUARANTOR

The manufacturer of a product is not a guarantor that nobody will get hurt in using the article. What the manufacturer is required to do is to make a product which is free from defective and unreasonably dangerous conditions.

Jury Instruction 12

UNFORESEEABLE MISUSE

If a manufactured product is defective in design and unreasonably dangerous, and that product is misused, the manufacturer's or seller's fault is diminished by the unforeseeable misuse. This is true only if:

1) a person uses the product in a manner the manufacturer or seller could not be expected to anticipate or provide against in the manufacture or sale of the product, and

2) the misuse of the product is a proximate cause of the damages.

CONTRIBUTORY NEGLIGENCE
(In General)

Everyone has a duty to exercise reasonable care for her own protection and safety and, in doing so, to make reasonable use of her faculties to avoid injury to herself. If she fails to do so, she is guilty of negligence. Accordingly, negligence of the decedent (Bonnie Weisgram) is "contributory negligence" if it concurs or combines with negligence of the defendants so that the negligence of all is a proximate cause of the decedent's injury, although the negligence of the defendants may have been different in degree or its effect.

PRESUMPTION OF ORDINARY CARE

In a case, such as this, where an individual has suffered death by accident and there is no eyewitness to the event, the decedent is presumed, out of regard for the natural instinct of self-preservation, to have exercised ordinary care at the time of the mishap. This presumption, like any other presumption, substitutes for evidence unless it is rebutted.

Jury Instruction 15

PROXIMATE CAUSE

Before a person can be held responsible for fault, that fault must have been a proximate cause of the injury.

A proximate cause is a cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. It is a cause which had a substantial part in bringing about the injury either immediately or through happenings which follow one another.

There may be more than one proximate cause of the injury. The fault of two or more persons may contribute to cause the injury, and in such case each person's fault is regarded as a proximate cause.

Jury Instruction 16

COMPARATIVE FAULT

The law requires that fault be apportioned among those parties you have found to be at fault in causing the plaintiffs' damages.

The determination of fault, and the allocation of fault will be done through a series of questions that you will be asked to answer on the verdict form that accompanies these instructions. For this purpose, defendants' fault, if any, consists of strict liability for product defect.

Plaintiffs' decedent's fault may consist of contributory negligence, misuse of a product, and/or failure to exercise reasonable care to avoid an injury.

If, by your answers to the questions on the verdict form, you have determined that two or more persons are at fault and that their fault was a proximate cause of plaintiffs' damages, you must apportion fault among them. Plaintiffs' decedent's contributory fault of 50% or more precludes any recovery.

NORTH DAKOTA STATUTE ON COMPARATIVE FAULT

32-03.2-02. Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering.

CONSIDERATION OF DAMAGES

If, adhering to these instructions, you find that plaintiffs are entitled to a verdict against the defendants, it will then be your duty to award the plaintiffs such damages as you find proportionate to the detriment suffered.

The question of damages is an entirely distinct and different question from the question of liability, and you must not consider the question of damages in this case until you have determined that the defendants are liable for the damages, if any, claimed by the plaintiffs. That the court gives instructions on damages or that counsel for either party may have discussed the subject is not to be taken by you as any intimation by the court or as any admission by a party of liability for the damages claimed by the other party.

Jury Instruction 19

DAMAGES DEFINED

Every person who suffers injury from a wrongful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages. Detriment is a loss or harm suffered in person or property.

Damages may be awarded for detriment resulting after the commencement of an action.

Jury Instruction 20

BURDEN OF PROVING DAMAGES

Even though the liability of the defendants may have been established, you cannot, assess damages against them unless the plaintiffs have satisfied the burden of proof with respect to their damages, if any. That is to say, the burden rests upon the plaintiffs to prove the elements of their damages, if any, by the greater weight of the evidence.

Jury Instruction 22

EXEMPLARY DAMAGES NOT ALLOWED

You may not include in any award of damages any sum for the purpose of punishing the defendants or to serve as an example or warning to others. The law does not authorize exemplary damages, sometimes referred to as punitive damages, in this action.

Jury Instruction 23

WRONGFUL DEATH

If the death of a person is proximately caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would have entitled the person injured, if death had not ensued, to maintain an action and recover damages in respect thereof, the wrongdoer who would have been liable to the decedent, if death had not ensued, is liable for damages to the surviving children.

MEASURE OF DAMAGES - WRONGFUL DEATH

In an action for damages for wrongful death, the measure of the damages to be awarded is the amount you find proportionate to the injury resulting from the death to the persons entitled to the recovery - in this case Bonnie Weisgram's sons. A substantial loss will be presumed. Damages should be adequate to fairly compensate for the loss or detriment suffered by the surviving heirs which was proximately caused by the negligence or other wrongdoing of the defendants, whether or not the loss or detriment could have been anticipated. Damages in any case must be reasonable.

In an action, such as this, by surviving children for the death of their mother, compensation may be awarded for economic damages, which are damages arising from medical expenses and medical care, loss of earnings and earning capacity, loss of income or support, burial costs, property damage, and other monetary losses.

You may also award non-economic damages which in this case may include mental anguish, emotional distress, and loss of society and companionship. In determining non-economic damages, you may consider the loss the children have suffered, and will suffer in the future, by being deprived of the comfort, society, protection and companionship of their mother. You may also consider and award damages for mental anguish and grief suffered by the surviving children up to the present time, and the mental anguish and grief they will suffer in the future because of the death of their mother.

In weighing these matters, you may consider the age of Bonnie Weisgram, and of her surviving children, the state of health and physical condition of Bonnie Weisgram and of her

children as it existed at the time of and immediately before death; her station in life; her expectancy of life; Bonnie Weisgram's disposition; and all other facts in evidence that throw light upon the question of pecuniary loss.

Jury Instruction 25

PROPERTY DAMAGE PAID BY STATE FARM

Economic damages for property lost paid by State Farm as a result of the Weisgram fire, if they are to be awarded, have been stipulated and agreed to be the sum of $100,575.42. In the event you decide to award any damages, this sum should be inserted on the proper line of the verdict form.

Jury Instruction 26

DAMAGES FOR FUTURE DETRIMENT REDUCED TO PRESENT WORTH

In computing the damages for pecuniary loss or detriment which, by reason of the injury, the plaintiffs will suffer in the future, you should take into account the present value of that future loss or detriment and reduce the gross amount of the damages to its present worth. The present worth of damages for future loss or detriment is the sum which, with interest at rates that may reasonably be expected, will equal the amount of the future loss or detriment at the time it occurs.

Jury Instruction 27

INTEREST ON DAMAGES

If you return a verdict awarding damages to the plaintiffs, interest thereon at a rate not greater than six percent per year from the date of the wrongdoing to the date of your verdict may be awarded in your discretion.

Jury Instruction 28

QUOTIENT VERDICT NOT ALLOWED

If you award damages to the plaintiffs, you must avoid using a "quotient" method by which the jurors agree in advance to have each juror write down the amount he or she considers to be a proper award, adding the amounts together, and then dividing the total amount by the number of jurors and making the result the amount to be awarded as damages. Likewise, any other method by which the jurors agree in advance to "split the difference" or to "strike a happy medium" between divergent estimates of value must be avoided. Those methods are illegal and must not be used or considered by you in arriving at any award of damages in this case.

* * *

of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and the change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are the judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Sixth - Verdict Form

A verdict form has been prepared for your use. You will take this form to the jury room with you, and when you have reached unanimous agreement as to each of the pertinent findings on the verdict form, you will have your foreperson sign and date it. You will then inform the bailiff, who will in turn inform me, that you have reached a verdict. When the bailiff returns to escort you back into the courtroom, the foreperson will carry the signed and dated verdict form in with him or her.

You will now take this case, try it fairly and impartially between the parties, and return such verdicts as are warranted under all the evidence and these instructions.

Plaintiffs' Joint Requested Instructions

Prelim 1.	Given - Prelim #1
Final 1.	Given - Final #1
2.	Given - Prelim #3
3.	Given - Prelim #4
4.	Given - Prelim #13
5.	Given - Prelim #14
6.	Given - Prelim #15
7.	Given - Prelim #16
8.	Given - Final #2
9.	Covered - Fin #1 and Pre #2
10.	Covered - Prelim #6
11.	Given - Prelim #17
12.	Given - Prelim #11
13.	Given - Prelim #9
14.	Covered - Final #5

15.	Given - Final #15
16.	Given - Final #9
17.	Rejected
18.	Given - Final #7
19.	Given - Final #8
20.	Rejected
21.	Rejected
22.	Given - Final #4
23.	covered - Final #24
24.	Given - Final #28
25.	Given - Final #30
Verdict Form	Covered

* * *

31.	Covered - Final 121 & 2
32.	Covered - Final #24
33.	Given - Final #26
34.	Given - Final #29
35.	Covered - Final #7
Verdict Form	Covered
Amended 32.	Rejected

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,

Plaintiff,

-vs-) CIVIL NO. A3-95-103

Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,

Defendants.

State Farm Fire & Casualty Insurance Company,

Plaintiffs,

-vs-) CIVIL NO. A3-95-104

Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation,

Defendants.

VERDICT FORM

We, the jury in the above-entitled action, for our special verdict, answer the questions submitted to us by the court as follows:

LIABILITY

1. Did the fire in the Weisgram home result from the electric baseboard heater?

Yes X No ___

Note: If your answer is "Yes," go on to question 2. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

2. Was the electric baseboard heater manufactured and sold by the Marley Company defendants in a defective and unreasonably dangerous condition at the time it was sold?

Yes X No ___

Note: If your answer is "Yes," go on to question 3. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

3. Was the defective condition of the electric baseboard heater manufactured and sold by the Marley Company defendants a proximate cause of Bonnie Weisgram's death?

Yes X No ___

Note: If your answer is "Yes," go on to question 4. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

4. Was Bonnie Weisgram at fault for her own injury and death? (You should consider only conduct on Bonnie Weisgram's part which may have contributed to her injuries resulting from the fire caused by the electric baseboard heater. Do not consider conduct on Bonnie Weisgram's part which may be related to an alternate cause of the fire.)

Yes ___ No X

Note: If your answer is "Yes," go on to question 5. If your answer is "No, " go on to question 6.

5. Was Bonnie Weisgram's fault a contributing proximate cause of her death?

Yes ___ No X

ALLOCATION OF FAULT

6. Taking the combined fault which contributed to Bonnie Weisgram's death as 100 percent, what percentage do you attribute to:

A. Marley Company defendants 100%

B. Bonnie Weisgram 0%

Total 100%

Note: You may only assign a percentage to Bonnie Weisgram if you answered "Yes" to questions 4 and 5.

DAMAGES

7. Economic damages: $ 100,575.42
(For example burial expenses)

Property damages: $
(Economic damages in the form of property damage paid by State Farm have been agreed to be $100,575.42, which you should include as a part of the economic damages if they are awarded.)

Noneconomic damages: $ 500,000.00

TOTAL: $ 600,000.42
(The total should reflect all of the damages incurred, regardless of percentage of fault. The court will reduce the damages to reflect fault.)

8. Should plaintiffs be awarded interest on the damages?

Yes ___ No X

Note: If your answer is "Yes," go on to question 9. If your answer is "No," please have the foreperson sign the verdict form and return it to the bailiff.

9. What rate of interest should be used (subject to a maximum of 6%)?

____%

Dated this 29th day of May, 1997, at Fargo, North Dakota.

/s/ Kevin M. Bakke
Foreperson of the Jury

United States District Court
District of North Dakota Southeastern Division

CHAD WEISGRAM, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,

JUDGMENT IN A CIVIL CASE

v.

Case Number: A3-95-103

MARLEY COMPANY, a Delaware Corporation, and its subsidiary, MARLEY ELECTRIC HEATING COMPANY, a Delaware Corporation, and UNITED DOMINION INDUSTRIES, INC., a Delaware Corporation,

---

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

v.

Case Number: A3-95-104

MARLEY COMPANY, a Delaware Corporation, and its subsidiary, MARLEY ELECTRIC HEATING COMPANY, a Delaware Corporation, and UNITED DOMINION INDUSTRIES, INC., a Delaware Corporation,

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED pursuant to the Jury Verdict returned on May 29, 1997, Plaintiff Chad Weisgram, decedent, have judgment against Defendants in the sum of $500,000.00, without interest.

IT IS FURTHER ORDERED AND ADJUDGED THAT Plaintiff State Farm Fire and Casualty Insurance Company, have judgment against Defendants in the sum of $100,575.42, without interest.

June 17, 1997 — Edward J. Klecker, Clerk — Date

/s/
By Deputy Clerk, Darlene J. Jose

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Plaintiff, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United Dominion Industries, Inc., a Delaware corporation, Defendants.	)	Civil No: A3-95-103 **DEFENDANT MARLEY'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, ALTERNATIVELY, FOR NEW TRIAL**

State Farm Fire & Casualty Insurance Company, Plaintiffs, vs. Marley Company, a Delaware corporation, and its subsidiary, Marley Electric Heating Company, a Delaware corporation, and United	)	Civil No: A3-95-104

Dominion Industries, Inc.,)
a Delaware corporation,)
)
Defendants.)

Motion for judgment notwithstanding the verdict

Defendant Marley renews the motion made at the close of all the evidence and moves the Court, pursuant to Rule 50(a), F.R.Civ.P., to set aside the verdict entered in the above entitled action on May 29, 1997 and the judgment entered on June 17, 1997 and to enter judgment in its favor in accordance with the motion for directed verdict made at the close of all the testimony, on the ground that the evidence was insufficient to support the verdict as a matter of law, as set forth with more particularity in the accompanying brief.

Alternative motion for new trial

In the alternative, Marley moves the court pursuant to Rule 59, F.R.Civ.P. to set aside the verdict and judgment and grant a new trial for any or all of the following reasons:

1. The verdict is contrary to law;
2. The verdict is against the weight of the evidence;
3. The honorable court erred during the course of the trial in several respects prejudicial to Marley, including:
   a. The court should have excluded expert opinion testimony from Dan Freeman because he was listed as a fact witness and not as an expert on the pretrial order;
   b. Federal Evidence Rule 702 and the U.S. Supreme Court's holding in *Daubert* required the trial court to exercise its gate keeping authority to exclude expert opinion testimony

from Dan Freeman, Ralph Dolence, and Sandy Lazarowicz;

   c. The court's instruction on circumstantial evidence was contrary to North Dakota law and was prejudicial error;
   d. The court's examination of a defense expert who was also the company representative crossed the bounds of judicial propriety, was grounds for mistrial, was highly prejudicial, and was plain error;
   e. The court erred in excluding photographs of defense expert's testing, which went to the heart of plaintiff's case; and
   f. The court's admission of character evidence on the issue of damages in a wrongful death action was contrary to North Dakota statutory and cm law and was prejudicial error;
   g. The court's instruction on the measure of damages for wrongful death was contrary to North Dakota law and was prejudicial error.

These grounds for the motion are more fully described in the accompanying supporting brief

Defendant respectfully requests that the court set this matter for hearing and grant judgment as a matter of law, or, alternatively grant Marley a new trial. Oral argument is requested.

DATED this 27th day of June, 1997.

Respectfully submitted by:

ZUGER KERMIS & SMITH
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By /s/ Christine Hogan
James S. Hill (#3158)
Christine A. Hogan (#3259)

Memorandum and order denying motion for judgment as a matter of law and for new trial included at A-28 in Joint Petition for Writ of Certiorari

Eighth Circuit Panel Majority Opinion and Dissent of Judge Bright included at A-1 in Joint Petition for Writ of Certiorari

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3735

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent, Appellee, v. Marley Company, a Delaware Corporation and its subsidiary, Marley Electric Heating Company, a Delaware Corporation; United Dominion Industries, Inc., a Delaware Corporation, Appellants. --- State Farm Fire & Casualty Insurance Company, Appellee, v. Marley Company, a Delaware Corporation; Marley Electric Heating Company, a Delaware Corporation;	*	Appeal from the United States District Court for the District of North Dakota.

United Dominion Industries, Inc., a Delaware Corporation, *

Appellants. *

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

February 23, 1999

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

In The United States Court of Appeals For The Eighth Circuit

No. 97-3735

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,

Plaintiffs/Appellees,

vs.

Marley Company, et al.,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

The panel majority's decision conflicts with the decisions of the Supreme Court and this Circuit. *See General Elec. Co. v. Joiner*, 118 S.Ct. 512 (1997); *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973). A rehearing by the full Court or the panel is therefore necessary to secure and maintain uniformity of the Court's decisions.

Furthermore, this proceeding presents questions of exceptional importance. First, the panel majority misapprehended the record and ignored North Dakota law to support its decision. Second, the panel majority vacated the judgment for plaintiffs after excising expert testimony, improper and contrary to the law of this Circuit and other Circuits. The panel majority also departs from the required standard of review, giving little or no deference to the District Court's evidentiary rulings - contrary to the mandates of the Supreme Court. Plaintiffs' petition should be granted.

POINTS OF FACT, AS OVERLOOKED OR MISAPPREHENDED BY THE PANEL MAJORITY

Evidence of Cause & Origin of the Fatal Fire

On December 30, 1993, Bonnie Weisgram died in a fire at her town home in Fargo, North Dakota. Upon arriving to investigate the fire, Capt. Freeman, a certified fire and arson investigator, found the exterior door closed and interior door open approximately 45°. *Freeman Tr.*, 18-19. Fire was burning on the south (left) side of the front door (the Marley heater was located behind this door). *Id.* at 16-17. No other visible fire was observed. *Id.* at 21, 27. A hole approximately two feet long was found under the Marley heater. *Id.* at 43; *Ex.* 8.

The entryway and sectional couch located on the upper level of the town home contained fire damage. *Id.* at 30-31; *Ex.* 2-4, 6, 8, 9-10. No evidence of flaming combustion in the polyurethane couch cushions was found. *Freeman Tr.*, 31-32, 60-61. No deep charring was found on the floor underneath the couch which would indicate flaming combustion. *Id.* at 32, 60-61. Freeman found no evidence of damage to the ceiling above the couch, and, therefore no evidence of a flaming fire in the couch. *Id.* at 32, 60-63. Further, a piano located 1 ½feet from the couch was in good condition after the fire. *Id.* at 55-56.

Freeman examined the entryway and observed deep charring alone the south wall where the Marley heater was located. *Id.* at 39-40; *Ex.* 2, 3, 4, 8. The hole in the floor was clear evidence that the fire burned most intensely and longest under the Marley heater. *Id.* at 72. Freeman observed significant damage to the ceiling above the entryway, directly over the hole in the floor. *Id.* at 45-46. Freeman also observed heavy heat damage and discoloration on the bottom of the Marley heater. *Id.* at 47-48; *Ex.* 5,7. Freeman concluded that the fire started at the Marley heater. *Id.* at 32, 60-61, 73-74, 84, 116-117, 175-177.

Freeman also concluded that a rug covered a portion of the Marley heater while it was running, causing the vinyl floor to become very hot. The panel majority stated there was no evidence of this *(Add.-2,* slip op. at 8-9), yet Chad Weisgram, Ryan Weisgram, and Merle Higgs testified that there was a "big throw rug" in the entryway prior to the fire that would sometimes catch and get pushed toward the Marley heater when the interior door was opened. Vol. IV, 114, Vol. IV, 8 9, 94; *Higgs. dep.*, 17. Freeman believed the adhesive underneath the vinyl floor began to overheat and "off-gas" (vent) underneath the heater. *Id.* at 64-67.

A remnant of a burned rug was found adjacent to the hole in the floor and was tested for accelerants. Vol. II, 53-54.

None were found. Freeman believed the open front door caused the rug to be pushed onto - and partially cover - the Marley heater prior to the fire, and off-gassing of the adhesive underneath the vinyl floor ignited the rug and other combustibles in the entryway. *Freeman Tr.*, 64-67.

Freeman found no evidence to support the possibility that the fire started in the couch by a cigarette. *Id.* at 60-61. Marley's expert, on the other hand, testified that a smoldering middle cushion was placed behind the interior door and in front of the Marley heater by the decedent - Marley's only explanation for the hole in the floor and the cause of the fire. *Ogle Tr.*, 43-46. Ogle admitted, however, that there was no evidence of a couch cushion in the entryway after the fire. *Id.* at 139-40, 146. Freeman testified that the middle cushion was still located on the couch when he investigated the fatal fire. *Freeman Tr.*, 75-76; Vol. VII, 142-144, 148-149. He personally observed the cushion to be on the couch. *Id.* at 148-149.

Dolence, a qualified professional fire investigator, received the Marley heater from the Fargo Fire Dept. and was provided with a set of photographs taken by Capt. Freeman. *Dolence Tr.*, 24-25. Dolence and Freeman also talked about the fire for over an hour. *Id.* at 25-26. They talked about every possible source of the fire to narrow the focus of the investigation. *Id.* at 26-28.

Dolence then examined the Marley heater and observed heavy damage and discoloration as a result of the fire. *Id.* at 36-37; *Ex.* 5, 7. Dolence also examined the remnants of the heater's aluminum fins and found that approximately one-third of the fins survived the fire virtually unscathed. *Id.* at 50-52, 54-55; *Ex.* 26. This showed that a portion of the heater was uncovered when the fire began, because the heat from the fins was allowed to escape. *Id.* at 50-52; 54-55. The melted aluminum fins indicated that the heat underneath the covered

portion was not allowed to escape and, instead, was reflected back into the heater. *Id.* at 54-57.

After reviewing the physical evidence, Dolence concluded that the entryway rug was pushed onto the Marley heater, causing heat to be trapped in and around the heater. *Id.* at 50-52, 54, 105-06, 168-69, 190-91. The Marley heater continued to produce heat until the adhesive underneath the vinyl flooring began "off-gassing." *Id.* The temperature in and around the heater continued to rise until it reached the ignition temperature for the adhesive, approximately 435° to 450° F. *Id.* at 48-49, 105-06, 190-91. Eventually, that portion of the rug covering part of the heater was consumed by the fire. *Id.* at 136.

Contrary to the panel majority's assertion, plaintiffs did not offer Freeman to testify about a defect in the heater. *Freeman Tr.*, 64. Dolence was also offered as a cause and origin expert only, but Marley chose to cross-examine him about the heater itself *Dolence Tr.*, 126-29, 187.

Evidence of Design Defect

Lazarowicz is a qualified metallurgist who testified that the Marley heater was defective because the silver regulating thermostat contacts contained serrations (serrations, in this case, are defined as grooves that appeared on the regulating thermostats' moveable arm contact). *Lazarowicz Tr.* 30-31, 51-52, 93, 111-12. He also testified that the condition of the heater's aluminum fins after the fire was evidence of a blockage of the air flow. *Id.* at 55.

The serrations observed and identified by Lazarowicz promoted electrical arcing and material transfer between the contact surfaces. *Lazarowicz Tr.*, 30-31, 51-52, 93, 11-12. He testified that approximately 25% of the silver on the moveable arm contact had been transferred to the stationary contact. *Id.* at 32-34, 38. He further testified that the

regulating thermostat contacts separated after the temperature of the contact surfaces reached a point which allowed the metal to soften and "unweld." *Id. at 46-51.*

Lazarowicz also compared the remnants of the Weisgram contacts with the exemplar contacts and found significant differences in the contact surfaces which proved the Marley contacts were welded together at the time of the fire. *Id.* at 40, 112, 114. He testified that the regulating thermostat was defective because the contacts did not "mate" squarely which promoted electrical arcing and material transfer in one quadrant of the moveable arm contact. *Id.* at 51-52. The uneven nature of the contact surface also caused the contacts to weld together at the time of the fire. *Id.* Based upon his examination of the contacts, he concluded that the Weisgram heater started on fire because the excessive amount of electrical arcing and material transfer finally caused the contacts to weld together on the date of the fire. The heater failed to shut off. *Id.* at 55-56, 110-12, 114.

Marley's own testing proved the design defect in the high limit control. That testing demonstrated that the high limit control did not turn off the heater until it reached dangerously high temperatures. *Id.* at 48, 54; *Oggle Tr.* 109-112. Because of its placement behind a deflector shield at the top of the heater, the high limit control, in this case, did not sense the dangerously high temperature until after the fire started. *Lazarowicz Tr.*, 113-14.

Marley's test results showed that a substantially similar 500-watt heater could produce sufficient heat to start a fire. In one test, the exemplar was allowed to run with the regulating thermostat and high limit control in place (normal operation). In that test, the air temperature in front of the heater reached 403°F before it turned off. *Ogle Tr.*, 109. In the same test, the aluminum fin tube which houses the heating element registered a temperature of 625°F. *Id.* at 109-10. It is important to note that the Marley heater had a regulating

thermostat which is used to increase or decrease the temperature by turning a dial. It also had a high limit control designed to turn off the heater when it senses temperatures in excess of 190°F.

In a second test by Marley, with the high limit control in place, the air temperature in front of the heater reached 417°F before it turned off. *Id.* at 110-11. This reading is 227°F higher than the temperature that should trigger the high limit control and turn off the heater.

Capt. Freeman testified that the flash point of an oil-based adhesive used to affix vinyl flooring is approximately 140°F and the ignition temperature is between 400° and 450°F. *Freeman Tr.*, 65-66. Dolence similarly testified that an asphalt (oil) based adhesive is a relatively flammable material with an ignition temperature between 435° and 450°F. *Dolence Tr.*, 48-49. Freeman also testified that the ignition temperature for a cellulose-based rug, similar to the rug in the Weisgram home at the time of the fatal fire, is between 375° and 520°F. *Freeman Tr., 64-65.*

ARGUMENT

I. PLAINTIFFS' PETITION SHOULD BE GRANTED TO SECURE AND MAINTAIN THE UNIFORMITY OF THE COURT'S DECISIONS RELATIVE TO THE APPLICATION OF SUBSTANTIVE STATE LAW UNDER THE *ERIE* DOCTRINE, A QUESTION OF EXCEPTIONAL IMPORTANCE.

A. Under the *Erie* Doctrine the Panel Majority is Required to Apply the Law as Defined by the North Dakota Supreme Court. Yet it Ignored North Dakota Law Relative to Plaintiffs' Burden of Proof.

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, (1938), the decisions of the North Dakota Supreme Court are binding on the panel majority in rendering their opinion in this case. The panel majority had the duty to "ascertain from all the available data what the state law is and apply it rather than prescribe a different rule, however superior it may appear." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). Despite such clear mandates, the panel majority mysteriously ignored applicable North Dakota law relative to plaintiffs' burden of proof. *See Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). A rehearing en banc is warranted in order to secure uniformity of prior decisions relative to this issue and to remedy the erroneous deprivation of plaintiffs' substantive rights.

B. The Panel Majority's Rendition of North Dakota Law Relative to Plaintiffs' Burden of Proof is Clearly Erroneous, Fundamentally Affecting Plaintiffs' Substantive Rights.

The panel majority neither correctly ascertained, nor correctly applied North Dakota law relative to Plaintiffs' burden of proof. *Add.-2,* slip op., pgs. 4-5. The panel majority does not discuss the substantial circumstantial evidence of the defective condition of the Marley heater nor mention that under North Dakota law, circumstantial evidence will suffice to prove the existence of a defect.

Conclusive proof is not necessary to show the existence of a defect under North Dakota law. *Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472, 478 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979) (in products liability action arising out of fire which was allegedly caused by malfunction or faulty design of electric wall heater, circumstantial evidence was sufficient to support imposition of strict liability on grounds of malfunction or faulty design of

heater). A defect may be inferred from proof that the product did not perform as intended by the manufacturer. *Herman*, 247 N.W.2d at 478.

Sufficient evidence was offered and received from which inferences in support of the plaintiffs' theory could reasonably be drawn. The able and experienced trial judge and the jury obviously accepted and found plaintiffs' evidence more credible. [I]t is for the jury to say what inferences shall be drawn, and they may be guided to their conclusion by the rule as to the burden of proof. Sometimes that rule may completely determine the result of a trial." *Fort Dodge Hotel Co. v. Bartelt*, 119 F.2d 253, 259 (8th Cir. 1941).

Plaintiffs' experts' opinions on the cause and origin of the fire and the physical evidence overwhelmingly support the jury's determination that the fire causing Bonnie Jo Weisgram's death resulted from a defect in the Marley heater. *Add.-2*, slip. op., Bright, J., dissenting, pgs. 20-23. This question of fact, decided by the jury upon conflicting evidence, must not be subject to re-examination by the panel majority. The panel majority's misstatement of the evidence conveys its basic misunderstanding of that evidence as applied to North Dakota law - which affected its underlying erroneous opinion. Because of the clearly erroneous application of North Dakota law affecting the substantial rights of plaintiffs, the Court should rehear this matter en banc. A two judge majority cannot be allowed to usurp both the role of the jury and the District Court.

II. PLAINTIFFS' PETITION SHOULD BE GRANTED TO SECURE AND MAINTAIN THE UNIFORMITY OF THE COURT'S DECISIONS CONCERNING THE PROPER REMEDY FOR AN ALLEGED ERROR IN THE ADMISSION OF EXPERT TESTIMONY.

A. Judgment as a Matter of Law for Defendant Marley is Improper and Contrary to the Previous Decisions of this Circuit and other Circuits.

Judge Bright correctly alerts us to the procedural impropriety of the panel majority's overreaching directive to grant Marley Company judgment as a matter of law. *Add.-2,* slip op., Bright, J., dissenting at pgs. 22-23. It has long been the law of this Circuit that if the District Court indeed erred in admitting the testimony of plaintiffs' experts, the relief to be awarded is a new trial, **not** judgment as a matter of law. *Id.*; *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973) (holding that the proper remedy for disposing of evidence erroneously admitted during the course of the trial is a new trial).

Because the panel majority is of the opinion portions of plaintiffs' experts' testimony were erroneously admitted, the panel has no alternative, under the law of this Circuit, but to grant a new trial rather than judgment as a matter of law to Marley. *Midcontinent*, 471 F.2d at 359. The panel majority cannot deviate from established precedent and ignore the evidence presented to the jury. *Id. See Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997) (adopting the rule expressed in this Circuit, and citing *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 696 (11th Cir. 1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); and *Midcontinent,* 471 F.2d at 358-59).

The panel majority "can discern no reason to give the plaintiffs a second chance to make out a case of strict liability." *Add.-2,* slip. op. at 4-5, ftn. 2. However, where a two judge majority opinion ignores North Dakota law impacting plaintiffs' substantive rights, departs from Circuit precedent, and misapprehends the facts, plaintiffs should be

afforded a "second chance" by the full Court – with consideration of all the evidence and a correct application of the law.

Under the circumstances, the grant of judgment as a matter of law to Marley was not the proper remedy under the law of this Circuit. The panel majority's clearly erroneous determination must be closely scrutinized by the Court en banc to maintain the uniformity of its decisions. If such an extraordinary departure from Circuit precedent is to be made, it should be made under the scrutiny of the full Court, not a panel majority.

Once the full Court considers all of the evidence admitted at trial, the full Court will conclude there was substantial evidence to support the jury's verdict. If the full Court then determines that evidence was erroneously admitted affecting the substantial rights of Marley, a new trial should be granted. A new trial on liability would be all that is necessary, as damages have already been determined. The magnitude of the panel majority's errors necessitates, at a minimum, a new trial.

III. THE PANEL MAJORITY'S "DE NOVO" REVIEW OF THE DISTRICT COURT'S ADMISSION OF EXPERT TESTIMONY INVITES INCREASED SCRUTINY AND APPEALS OF DISCRETIONARY RULINGS ON FED.R.EVID. 702 ISSUES, EFFECTIVELY RE-OPENING THE GATE THAT *JOINER* HAD CLOSED.

A. The Panel Majority Failed to Give the District Court the Deference that is the Hallmark of Abuse of Discretion Review.

"'Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony.'" *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 283 (8th Cir.

1995)(quoting *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990)). Once the trial court has determined "that a witness is competent to testify as an expert, challenges to the experts skill or knowledge go to the weight to be accorded the expert testimony rather than to its admissibility." *Fox*, 906 F.2d at 1256; *Williams v. Pro-Tec, Inc.*, 908 F.2d 345, 348 (8th Cir. 1990); *Davis v. American Jet Leasing Inc.*, 864 F.2d 612, 614-15 (8th Cir. 1988); *Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 276-77 (8th Cir. 1978).

Rule 702 requires a district court to make a preliminary finding that proffered expert testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). District courts are to perform a "gatekeeping" function to insure that proffered expert testimony is both relevant and reliable. *See Dancy v. Hyster Co.*, 127 F.3d 649 (8th Cir. 1997); *Peitzmeier v. Hennessy* Indus., *Inc.*, 97 F.3d 293, 296-297 (8th Cir. 1996).

The United States Supreme Court, in *General Elec. Co. v. Joiner*, 118 S.Ct. 512 (1997) made it unequivocally clear that abuse of discretion is the proper standard of review by which an appellate court reviews a district court's decision to admit or exclude scientific evidence. *Id.* This appellate court cannot reverse the evidentiary rulings of the District Court unless they were manifestly erroneous. *Id.* at 517; *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999).

Irrespective of established precedents of this Circuit and unequivocal mandates of the United States Supreme Court, the panel majority gives no deference to the District Court and, more or less, reviews the District Court's admission of plaintiffs' experts' testimony de novo. In this case, the District Court found no reason to exclude their testimony, as each of the experts were qualified to render their opinions which were "well-grounded in established methodologies." *Add.-1*, pg. 6.

After analyzing the testimony in light of *Daubert*, the District Court found that "no *Daubert* problems were

present." *Add.-1*, pg. 6-8. The District Court evaluated the underlying factual support and evidence supporting the experts' bottom-line opinions and determined that adequate support existed to mark the testimony as reliable. A proper application of the correct standard of review in this case indicates that the District Court did not abuse its discretion. *See Add.-2*, slip op., Bright, J., dissenting, at pgs. 16-17.

The overarching theme throughout the panel's majority opinion is an open dissatisfaction with the conclusions reached by plaintiffs' experts -- leading to the panel's erroneous conclusion that the testimony of plaintiffs' experts is unreliable. The panel majority goes too far, making a critical error in its analysis of reliability by impermissibly assessing plaintiffs' experts' credibility. *Daubert* forbids judges from assessing the strength of an expert's conclusions, which is the province for the jury. 509 U.S. at 596.

B. The Panel Majority's Substitution of Its Own Erroneous Judgment for that of an Able and Experienced District Court Sets a Broad Precedent Which Effectively Subverts the Discretion of District Courts and Invites Litigation and Appeals Concerning Evidentiary Rulings.

The panel majority does not explain the reasons for its deviation from precedent and practice in this Circuit. If deference to the District Court would be defined as the panel majority would have it defined, every case would be appealed. The panel majority has essentially conducted a trial de novo of the District Court's assessment of the reliability of plaintiffs' proffered expert testimony, substituting its own erroneous judgment and reasoning for that of the District Court, rather than reviewing the District Court's rulings and reasoning for an abuse of discretion. The panel majority

radically departs from the directives of the United States Supreme Court in this regard.

District Court judges, unlike appellate judges, have a broad array of tools which can be brought to bear on the evaluation of expert testimony. Because of the District Court's special vantage point, it is quite odd and contrary to law for the panel majority to start from scratch and undertake its own de novo review of the District Court's rulings. *See Joiner,* 118 S.Ct. 512. "An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction [or] resolve the ambiguities differently." *Aetna Cas. & Sur. Co. v. General Elec. Co.,* 758 F.2d 319, 327 (8th Cir. 1985) (quoting *Inwood Lab. v. Ives Lab.,* 456 U.S. 844, 857 (1982)).

The broad precedent set by the panel majority will profoundly affect the trials and outcomes in substantial numbers of cases, especially fire cases, effectively subverting the broad thrust of the Federal Rules of Evidence, the discretion of District Courts within this Circuit, and raising the bar to an impossible height for the admission of expert testimony from qualified cause and origin experts in fire cases involving products. The importance of these issues require examination by the Court en banc.

CONCLUSION

The panel majority can only be seen to have recited selected facts (often irrelevant) from the record to give a veneer of plausibility to a core of speculation. In the end, the panel majority's conclusions about how the jury should have decided the case, should not, and cannot be injected into their analysis of the law, let alone alter the results of the trial and the discretionary rulings of an able and experienced trial judge. For these reasons and the reasons stated above and in

the dissent of Judge Bright, the decision of the panel majority should be vacated and this matter reheard by the panel or the Court en banc.

Respectfully submitted,

Dated: 3/17/99

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Eighth Circuit Civil No. 97-3735NDF
District Court Civil Nos. A3-95-103 and A3-95-104

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,

Plaintiffs/Appellees,

vs.

Marley Company, et al.

Defendants/Appellants.

On appeal from the United States District Court
for the District of North Dakota

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I. INTRODUCTION

The petition should be denied. None of this court's stringent threshold requirements for rehearing have been fairly met. The panel majority had it right. This is "not a close case." *Slip op. 4 at fn. 2.* The holding follows established Eighth Circuit law and it is entirely consistent with recent pronouncements of the Supreme Court in *Kumho Tire Company v. Carmichael, 1999 WL 152275 U.S.,* and *General Electric Co. v. Joiner, 522 U.S. 136, 143 (1997).* In fact, *Kumho Tire* confirms plaintiffs had it wrong when they urged this court to adopt the Tenth Circuit's rationale in *Compton v. Subaru of America, Inc., 82 F.3d 1513 (10th Cir. 1996)* that testimony on engineering issues falls outside the scope of *Daubert* and it confirms this court had it right all along when it held *Daubert's* reliability criteria do indeed apply to engineers' and technical experts' opinions in product liability cases.

Contrary to the arguments in plaintiffs' petition, the panel majority did not misapprehend the record. Its exposition of facts was accurate, with record citation to every part of it. The panel correctly cited and applied North Dakota statutory and case law regarding the plaintiffs' burden of proof in a product liability case and correctly found a complete failure of proof on the issues of product defect and causation, thus entitling Marley to judgment as a matter of law. The panel majority correctly determined that there was not substantial evidence in the record to support the verdict even when the evidence was viewed in the light most favorable to the plaintiffs. The majority applied the correct standard of review to the district court's evidentiary rulings and eight times found the district court abused its "admittedly broad" discretion by exposing the jury to fundamentally unsupported expert opinion. Finally, the panel followed valid precedents in this circuit and other circuits in determining that judgment as a

matter of law is the appropriate disposition where there is not sufficient evidence to support a jury verdict and where the plaintiffs had their day in court. In summary, the panel carefully followed the law in determining that the lower court judgment was wrong and could not stand. There is no basis for a rehearing.

II. ARGUMENT

A. The exposition of the facts in the majority opinion was accurate.

Plaintiffs argue first that the panel majority got the facts wrong. *Pet. 1-7.* Then they rehash their theory of the case for seven pages, without pointing to a single item that the majority opinion misstated, miscited, misconstrued, or overlooked.

Some of their points require brief response. At pages 2-4, plaintiffs reiterate Freeman's and Dolence's testimony that a rug was "pushed onto the Marley heater," without ever attempting to address the majority's explicit concern that Dolence's testimony about the rug's position was pure "conjecture." *Slip op. 10.* In reality, Dolence admitted at trial that no eye witness had ever seen a rug blocking the heater and admitted that Freeman had told him on the same day he investigated the fire he saw "nothing blocking that heater." *Dolence, 132-33; 136-37.*

At page 4 of the petition, plaintiffs say that they did not offer Freeman to testify about a heater defect. This is not candid. As the majority correctly noted, Freeman told the jury, over objection, at least five times that the heater malfunctioned, "ran away," and started the fire. *Freeman, 32, 60, 63, 64, 68-69, 78, 175.*

Plaintiffs' statement on page 5 that Dolence was only offered as a cause and origin expert and not to testify about

the "heater itself" is similarly lacking in candor. Plaintiffs advise that Marley *chose* to cross-examine Dolence about the heater. This advice is inexplicable in light of the fact that plaintiffs' counsel, on *direct,* asked Dolence questions about his examination of the heater and his findings with respect to it for over *twenty pages* of the trial record. *Dolence, 80-100; see also 36-37, 50-59.* Indeed Dolence did testify about the "heater itself" on direct: "It was the operation of the heater that continued to heat by being covered up that allowed this .... catastrophic event." *Id. 57.* "It was my opinion that the heater was the source of the fire." *Id. 83.* Dolence also told the jury, on direct, that he had an opinion that the thermostat "failed" and caused "uncontrolled heating." *Id. 90-91, 92.* Still on direct, Dolence said the high limit device did not sense heat as it should have and thus failed to shut the heater off. *Id. 92-93.*

At pages 5-7 of the petition, plaintiffs described their theory of design defect. They simply summarized again Lazarowicz's observation that there were serrations on the thermostat contacts and his other observations of the heater. But plaintiffs' discussion on these points is most noteworthy for what it does *not* address. They did not even attempt to answer the panel majority's point: that Lazarowicz had no specialized knowledge about heaters and admitted he was *not an expert* in fire cause and origin, in baseboard heater operation, or in the design or testing of contacts in this type of heater. *Slip op. 11-12.* Moreover, they did not even try to argue that Lazarowicz was actually qualified in heater design or that his opinions about the design were actually reliable. Even in view of the panel majority's exposure of Lazarowicz's total lack of experience, education, or study that would qualify him to testify about this heater's operation or design, plaintiffs did not come forward with any facts in the record bolstering Lazarowicz's credentials which the majority might have overlooked. They did not because no such bolstering

facts exist. The majority was correct in its observation that Lazarowicz opined to the jury about defects in the heater's design while knowing "practically nothing" about this or any other heater. *Id. 12.* In short, plaintiffs' petition does not even attempt to refute the panel majority's conclusion that Lazarowicz's opinions amounted to no more than "subjective belief or unsupported speculation." *Id. 13.*

Finally, and perhaps most misleading of all, is plaintiffs' contention on pages 6-7 that Marley's "own testing" proved the design defect in the high limit control. This is a total misconstruction of the record. In reality, Dr. Ogle, an independent consultant retained by Marley, testified that his testing program conducted on the Ferguson exemplar heater demonstrated that the high limit switch cycled exactly as it was designed to cycle and the overall temperatures seen by the heater were far too low to pose a fire hazard either to a rug or to adhesive under the floor. *Ogle, 79-83, 113-120.* More to the point, plaintiffs failed to answer the panel majority's observation that it was *plaintiffs'* own testing conducted by Dolence that established there was no defect in the heater's design. *Slip op. 11.* Dolence checked the temperatures generated by the exact same Ferguson exemplar that Ogle later tested and found they did not pose a danger. *Id.* He tried, but could not make the heater overheat, even at maximum output. *Id.* Based on his own temperature test results, Dolence admitted in deposition and at trial that the Marley heater was not defective in design in any respect. *Dolence, 139-40, 143.* Dolence never tested his "run away" heater theory. *Slip op. 10.* Marley did and proved it false; the Marley heater is not capable of running away. *Ogle, 79-83, 113-120.*

B. The panel majority correctly applied North Dakota law regarding plaintiffs' burden of proof.

Plaintiffs argue at pages 8-10 of the petition that the panel majority incorrectly applied North Dakota law because it did not discuss the "circumstantial evidence" of the "defective condition" of the Marley heater. The point is not well taken. The petition never identified exactly what plaintiffs' circumstantial evidence of defect consists of.[1] The panel majority correctly cited and applied North Dakota law regarding plaintiffs' burden of proof in a product liability case as set forth in *Endresen v. Scheels Hardware & Sports Shop, Inc., 560 NW2d 225, 229 (N.D. 1997).* Both the *Endresen* court and the North Dakota Product Liability Act require that a product actually have a defect or be in a defective condition at the time of its sale to support a product liability action. *N.D.Cent.Code § 28-01.3-06.* Plaintiffs were not specific in their petition about exactly how the appellate court misapplied North Dakota law, but they seemed to be suggesting that this court should just *assume* plaintiffs proved their case by circumstantial evidence.

In reality, this is not an appropriate case for application of the circumstantial evidence rule. The Eighth Circuit said in *Lindsay v. McDonnell Douglas Aircraft Corp.,460 F.2d 631 (8th Cir. 1972)* that courts would prefer in a strict liability case to "have proof of a specific defect causing the accident" unless that is not possible because the evidence has been *destroyed. Id. 638.* The evidence in this case was not destroyed, but was merely damaged due to exposure to an external fire. Dolence inspected the heater components and testified that he was not able to identify a particular design or

[1] The panel majority rightly observed that during oral argument plaintiffs remained vague about their defect theory. *Slip op. 4.* Counsel for State Farm seemed to abandon any design defect claim.

manufacturing defect or malfunction, but merely said the thermostat and high limit control must have failed. *Slip op. 10.* This is not called "circumstantial evidence" of a "defective condition." This is called "rank speculation" by an expert. *Id.*

Plaintiffs have not explained why this court should even discuss permitting proof of a defect by circumstantial evidence in a case where it is not possible to exclude an alternative potential cause of the fire. In *Endresen, supra,* the North Dakota Supreme Court said proof by circumstantial evidence is appropriate only where the evidence *"excludes equally reasonable inferences of other causes for which the defendant is not responsible."* (emphasis added) *Id. 232.* In this case, Marley contends the fire was caused by cigarette ignition of the sofa, which was partially destroyed by the fire. The panel majority correctly noted that neither the Weisgram family nor State Farm took any action to preserve the sofa for inspection or testing by the defendant, but discarded it before this litigation. *Slip op. 8-9 at fn. 5.* Ironically, certain admissions in plaintiffs' petition conclusively prove Marley's cigarette ignition theory of the case was correct. Plaintiffs said at page 2 that Freeman found no evidence of a "flaming fire" in the sofa, indicating only a *smoldering* fire.[2] See also, *Bright, dissent, Slip op. 17. ("The sofa exhibited signs of smoldering combustion, but not flaming combustion.")* But Dr. Ogle presented unrefuted scientific evidence that the smoldering fire in the sofa could only have been ignited by a *smoldering ignition source, and the only smoldering ignition source in the house was a cigarette. Ogle, 39, 48.* Plaintiffs could not and did not present a shred of evidence to contradict this expert opinion.

[2] Dr. Ogle, a chemical engineer and an expert in combustion, explained that there was smoldering combustion in the sofa that eventually transitioned into flaming combustion. *Ogle, 152-53.*

C. Granting judgment as a matter of law was proper.

Plaintiffs argue that the Eighth Circuit's holding in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc., 471 F.2d 357 (1973)* calls for a new trial, not a JMAL, when expert evidence is erroneously admitted. But *Midcontinent* is not on point, and the panel majority correctly followed valid precedents established by this court in *Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1108 (8th Cir. 1996)* and in *Omaha Indian Tribe v. Wilson, 575 F.2d 620 640 (8th Cir. 1978).* In *Midcontinent,* the trial court granted JNOV when it concluded after a jury verdict that it had erred in admitting certain expert testimony. Part of the appellate court's rationale for determining that JNOV was not appropriate in that particular case was its concern that plaintiff, if forewarned, might have supplied "further foundation or even totally different evidence." *Id. 359.* These circumstances are clearly distinguishable from the facts in the case at hand.

There is no suggestion in this case of any additional foundation or further proof plaintiffs could have introduced to bolster their theory that a heater defect caused the fire. To the contrary, as the majority panel pointed out in footnote 2 *(Slip op. 4-5),* Weisgram and State Farm had their day in court. No litigant is entitled to more than that. There is no reason to reopen discovery here. This is the same conclusion this court reached in granting JMAL to the defendant in *Peitzmeier v. Hennessy, supra,* after the trial court determined plaintiffs expert testimony was inadmissible.

As the panel majority rightly pointed out, plaintiffs' entire theory was based on "rampant speculation," not substantial evidence. In this circuit, expert speculation cannot support a judgment. *Omaha Tribe, supra, 640-46.* The case should never have gone to the jury, but did. By rights, the trial court

should have granted Marley's motion for a directed verdict at the close of plaintiffs' case on the stated ground that plaintiffs had a complete failure of proof as to a design defect and as to any mechanism by which this 500-watt heater, even if it had continued to run, could have "run away" and caused a fire. *R. VI, 4.* The trial court had another opportunity to grant a directed verdict motion at the close of all the evidence when Marley again pointed out that the plaintiffs had failed to meet their burden of proof because neither Dolence nor Lazarowicz had provided an explanation of the cause of the fire. *R. VII, 160-61.* Failing that, the trial court should have granted Marley's post-trial motion for JMAL *(App. 000300-310)* when Marley demonstrated that plaintiffs' entire case was based on unsupported expert speculation, which has never been allowed to support a verdict in this circuit before or after *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993)("the word 'knowledge' connotes more than subjective belief or unsupported speculation.")* Marley informed the trial court in its motion for JMAL that this circuit's pre- and post-*Daubert* case law has never allowed experts to speculate and has always held that expert speculation is not substantial evidence to support the judgment. *Def.'s mot. for JMAL, App. 000300-310.*

The trial court's denial of JMAL is a legal question that is fully reviewable in this court based on the same standard that was before the district court: whether there was sufficient evidence to support the verdict. *McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1400 (8th Cir. 1994).* Under the circumstances of this case, *Midcontinent* is not the relevant precedent. Here the reviewing court did not simply "excise" the expert opinion as the trial judge in *Midcontinent* did in reaching its conclusion that there was no substantial evidence to support the verdict. Rather, after reviewing the entire record, the panel majority took pains to explain that plaintiffs' entire proof consisted of no more than "subjective belief and

unsupported speculation." *Slip op. 13.* In this respect, *Omaha Indian Tribe, supra,* and *Wright v. Willamette, supra,* provided ample precedent for granting JMAL. In *Omaha,* which was decided after *Midcontinent,* this court vacated and remanded to the trial court with directions to enter judgment in favor of the tribe after determining that the land owners' experts' opinions were mere speculation, not "substantial evidence." *Id. 646. Accord, Wright v. Willamette, supra; Brock v. Caterpillar, Inc., 94 F.3d 220 (6th Cir. 1996); Smelser v. Norfolk Southern Railway Co., 105 F.3d 299, 302 (6th Cir. 1996).*

D. The panel majority employed the proper standard of review.

Contrary to plaintiffs' suggestion at page 12 of the petition, the panel majority did not conduct a *de novo* review of the expert testimony. Instead, the majority explicitly and repeatedly stated that it was indeed applying the abuse-of-discretion standard to the district court's evidentiary decisions, as required by the U.S. Supreme Court decision in *Joiner,* and by previous rulings of this circuit. See, e.g., *Peterson v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995).* The majority panel nevertheless said eight times that the trial court abused its "admittedly broad" discretion when it admitted "blatant speculation" from Freeman, "rank speculation" from Dolence, "unsupported speculation" from Lazarowicz, and "rampant speculation" from all three experts about "how the 'run away' heater might have ignited the fire." *Slip op. 6-14.*

Nothing in the recent *Kumho Tire* decision requires a rehearing here. *Kumho* clarified that *Daubert's* gatekeeping obligation applies to all expert testimony and reiterated *Joiner's* holding that abuse of discretion is the appropriate standard. Since the panel majority took some pains to explain it was following *Joiner* precisely, it follows that it did extend

appropriate deference to the trial judge. *Kumho* requires nothing more. *Kumho* does not require, as plaintiffs seem to be suggesting here, a rubber stamp of every trial court ruling admitting or excluding expert testimony. As Justice Scalia noted in his concurring opinion in *Kumho,* "trial court discretion in choosing the manner of testing expert reliability–is not discretion to abandon the gatekeeping function." When an able and experienced trial court abuses its "admittedly broad" discretion by admitting "rampant speculation" by experts, it is incumbent upon the appellate court to so hold–and to reverse where, as here, the testimony influenced the jury. There would be no need for appellate review of evidentiary decisions if trial courts were free to admit expert opinion without first determining the expert is qualified and without first scrutinizing the opinion for some indicia of reliability.

III. CONCLUSION

The trial court did abandon it gatekeeping function in this case and the panel majority was right to hold that this was an abuse of discretion. This was not a close case. The jury verdict cannot stand.

Respectfully submitted.

Dated this 8th day of April, 1999.

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Order Denying Petition for Rehearing and for Rehearing En Banc included in Joint Petition for Writ of Certiorari

Supreme Court, U.S.
FILED
NOV 12 1999
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(3)

No. 99-161

In the

Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.

Petitioner,

vs.

Marley Company, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Did the Eighth Circuit panel majority err when, after deciding to exclude certain expert testimony, it reviewed the record to see what valid evidence remained, and then ordered judgment entered for respondent, instead of considering whether petitioner should be allowed another opportunity to prove his claim or at least allow the district court that had heard the trial to make the new trial determination?

INTERESTED PARTIES

Petitioner/Appellee Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent.

Petitioner/Appellee State Farm Fire and Casualty Insurance Company. After certiorari was granted, State Farm obtained a voluntary dismissal from the appeal. Thus, State Farm is no longer a party to the action.

Respondents/Appellants Marley Company, a Delaware corporation and its subsidiary, Marley Electric Heating Company, a Delaware corporation; and United Dominion Industries, Inc., a Delaware corporation.

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The opinion of the Eighth Circuit Court of Appeals is reported at 169 F.3d 514 (8th Cir. 1999) and reproduced in the *Appendix of Joint Petition for Writ of Certiorari* at A-1. The Court of Appeals (voting two to one) vacated a judgment in favor of the plaintiffs/petitioners and remanded for entry of judgment, as a matter of law, in favor of defendants/ respondents on February 23, 1999. The Petition for Rehearing and Rehearing en Banc was denied on April 26, 1999. Joint App., p. 169. The unreported Order of the District Court dated September 4, 1997, in which it denied respondents' Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial, is reproduced in the Joint Appendix. Joint App., p. 127.

BASIS FOR JURISDICTION

The Judgment of the Court of Appeals was entered on February 23, 1999. The Petition for Rehearing and Petition for Rehearing En Banc were denied on April 26, 1999. The Petition for Certiorari was filed on July 22, 1999 and was granted on September 28, 1999. Chapter 28 U.S.C. § 1254 confers on this Court jurisdiction to review the judgment in question.

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The rules involved in this case are: Rule 59(a)(1) of the Federal Rules of Civil Procedure which states: "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States"; and, Rule 50 of the Federal

Rules of Civil Procedure which is reproduced in the Appendix to this brief.

The Seventh Amendment to the United States Constitution which states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

INTRODUCTION.

This case arose out of a tragic fire before dawn on December 30, 1993, at the home of Bonnie Weisgram in Fargo, North Dakota, which resulted in her death. At the outset of this litigation, three separate claims were asserted against respondents: the wrongful death claim on behalf of Bonnie Weisgram; the property damage claim to her property asserted by State Farm Fire & Casualty Insurance Company; and the claim for damage to the adjoining property which was also paid by State Farm via an assignment.[1] The cases were filed in federal court pursuant to 28 U.S.C.§ 1332. The cases were consolidated for trial on February 12, 1996. Joint App., p. 64.

In the Complaint, petitioner alleged a heater manufactured by United Dominion Industries, Inc., a Delaware corporation through its wholly-owned subsidiary, the Marley Company, a Delaware corporation (respondents) was defective under North Dakota law and caused the fire in the Weisgram home. Most significant for this petition, the law of North Dakota allows a plaintiff to prove a product

[1] After certiorari was granted, State Farm obtained a dismissal from the appeal. Thus, State Farm is no longer a party to the action. Hence, this brief will use the term petitioner throughout to refer to plaintiffs collectively.

defect by circumstantial evidence. *See, Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). In addition, because several key components in the Weisgram heater were destroyed in the fire, it was impossible to recreate the events on the night of December 30, 1993, using the actual heater. Thus, the circumstantial evidence presented at trial played a significant role in the proceeding.

There is no dispute that Bonnie Weisgram died of smoke inhalation sometime before dawn on December 30, 1993. As stated above, petitioner contended that the fire was caused by a faulty heater manufactured by respondents, whereas respondents argued to the jury that Bonnie Weisgram caused the fire by dropping a cigarette in the couch in her living room. After a two week trial, the jury returned a verdict of $500,000 in favor of petitioner, necessarily rejecting respondents' cigarette theory of causation. The trial judge rejected all of respondents' motions for judgment as a matter of law and a new trial, and respondents appealed to the Eighth Circuit, which reversed because of erroneous admission of expert testimony. Not only did the Eighth Circuit panel majority set aside the judgment, but it directed the entry of judgment in favor of respondents based on its evaluation of the record as being insufficient to sustain a verdict for petitioner if there were a retrial. In doing so, the Eighth Circuit panel majority did not consider whether petitioner might be able to present additional evidence that had not been offered in the first trial. In addition, the Eighth Circuit panel majority did not consider whether the district court, which had heard all the evidence and had managed the case below, was in a better position to decide, as a matter of discretion, whether it was appropriate to order a new trial. Petitioner sought review of this Court on several issues, but review was limited to the question of the propriety of the order directing judgment in favor of the respondents.

In order to understand why the Eighth Circuit panel majority should have ordered a new trial, or at least allowed the trial judge to determine whether a new trial was warranted, it is necessary to review the trial record and to consider it in light of the factual contentions made by the parties and the requirements of North Dakota law. Because the issue before the Court is the propriety of the Eighth Circuit panel majority's decision, petitioner will set forth the evidence in much greater detail than would ordinarily be appropriate in this Court to demonstrate the unfairness of denying petitioner an opportunity to argue for a new trial before the district court. Although some of the factual presentation could be seen as arguing that the rulings excluding certain of petitioner's evidence were in error, those facts are all relevant to the issue of the cause of the fire and whether there was sufficient circumstantial evidence of a defect in respondents' heater to satisfy the requirements of North Dakota law.

A. THE CAUSE OF THE FIRE.

Captain Dan Freeman of the Fargo Fire Department was the first firefighter inside the Weisgram town home shortly after 6:00 a.m. on December 30, 1993. Freeman Tr., pps. 18-19. When Freeman arrived at the scene, he noticed fire burning on the south (left) side of the front door of the structure. *Id.* at 16-17. The fire was burning at the floor level and extended upward approximately 18 to 24 inches. *Id.* at 17, 19. Freeman doused the fire with water and entered the town home. *Id.* at 19. The exterior door was closed but the interior door was open approximately 45°. *Id.* at 18-19. Freeman did not see any other visible fire within the town home and never saw flaming combustion in the couch at any time. *Id.* at 21, 27.

Freeman then began a search and rescue operation. *Id.* at 21. He found Bonnie Weisgram in a bathroom on the upper

level of the home but she was already dead. *Id.* at 24, 88. Freeman and another firefighter, Roger Thorseth, carried Bonnie Weisgram's body outside. *Id.* at 24-25. After determining there were no other victims in the town home, Freeman began investigating the cause and origin of the fire. *Id.* at 25, 28.

Freeman immediately focused on the entryway and sectional couch located on the upper level of the town home as those areas contained the most fire damage. *Id.* at 30-31; Ex. 2-4, 6, 8, 9-10. Freeman examined the couch carefully to determine whether the fire started in that location. *Id.* at 31-32, 60-61. He started with the polyurethane couch cushions, but he did not see evidence of byproducts of flaming combustion. *Id.* at 31-32. He looked underneath the couch but did not see any deep charring on the floor which would indicate flaming combustion. *Id.* at 32, 60-61. He also looked above and behind the couch, and at the nearby piano, and saw no indication of significant fire damage in either place. *Id.* at 32, 55-56, 61-63, 176.

Freeman saw that the most severe damage on the upper level was located on the backside of the couch. *Id.* at 70, 75. The back of the couch was exposed to the entryway except where a wrought iron railing stood in the way. *Id.* at 59. Freeman also noted charring on the woodwork along the floor of the upper level and behind the couch. *Id.* at 70, 119-120; Ex. 224. In Freeman's mind, heat which was sufficient to char the wood trim board on the upper level was sufficient to ignite the cloth on the back of the couch. He also determined that the open interior door would not have prevented the fire from reaching the back of the couch. *Id.* at 69. Freeman considered the possibility that the fire started in the couch by a cigarette but rejected that possibility as there was "no evidence to back it up." *Id.* at 60-61.

Freeman then turned his attention to the entryway. He saw deep charring along the south wall where the heater was located. *Id.* at 32, 39-40; Ex. 2, 3, 4, 8. He also saw deep

charring on the east wall where the front door was located. *Id.*; Ex. 2, 3, 6, 8. These were the areas where Freeman saw fire when he arrived at the scene. *Id.* at 17-19, 21, 36-37. The fire patterns were consistent with a fire that ignited from a source in the southeast corner of the entryway where the heater was located. *Id.* at 74.

Freeman, continuing his investigation in the entryway, saw a hole approximately two feet long underneath the heater, strongly indicating that the fire burned most intensely and the longest at that location. *Id.* at 37, 43, 49-50, 72; Ex. 8. Freeman also noted significant damage to the ceiling above the entryway, directly over the hole in the floor. *Id.* at 45-46. Finally, Freeman saw heavy heat damage and discoloration on the bottom of the heater. *Id.* at 47-48; Ex. 5, 7.

Freeman asked another firefighter, Gerald Splitt, to take a sample of debris next to the hole to find out whether an accelerant was present. *Id.* at 50-51. Splitt took a sample of rug material and other debris at the edge of the hole in the entryway floor.[2] Vol. II, pps. 53-54. The state laboratory did not find any evidence of accelerants and arson was ruled out as a cause of the fire. Freeman Tr., pps. 51-52; Vol. II, p. 57.

The deposition of Merle Higgs, Bonnie Weisgram's fiancé, was read to the jury as he was not available for the trial. He testified that there was a "big throw rug" in the entryway where Bonnie Weisgram would place her shoes when using the front door. Higgs Depo., p. 17. The rug, which had a "shaggy" surface with a "looping" weave, would occasionally get pushed back -- toward the baseboard heater -- when the interior door was opened. *Id.* at 17 -18. The description of the rug, and what happened to it when the door was opened, were confirmed by the testimony of Bonnie

[2] Splitt is a Captain in the Fargo Fire Department. Vol. II, p. 50. He has been a firefighter for 31 years and a fire and arson investigator since 1980. *Id.* at 50-51. Splitt testified that it was obvious where the fire originated - in the area of the hole. *Id.* at 52-53, 63.

Weisgram's two sons, Chad and Ryan. Vol. IV, pps. 94-95, 97-98, 114.

Based upon his observations and the physical evidence at the fire scene, Freeman concluded that the fire started in the area of the heater. Freeman Tr., pps. 32-33. He believed that the throw rug in the entryway, a remnant of which was found adjacent to the hole in the floor, was pushed up against the heater. *Id.* at 64, 67. The throw rug "trapped" the heat and ignited the glue underneath the vinyl flooring directly under the heater. *Id.* at 64-67. The fire in the entryway eventually ignited the couch. *Id.* at 32-34, 73-75.

As a result of his investigation, which was conducted as part of his job and not as an expert employed by petitioner, Freeman eliminated the potential causes of the fire -- arson, accidental, cigarette ignition, and an electrical source (other than the heater).[3] Because Freeman believed that the heater was the likely cause of the fire, he sent the heater and photographs of the fire scene to Ralph Dolence, another experienced fire investigator who lived in Ohio, for further evaluation. *Id.* at 77-80.

Dolence, whose qualifications as a fire investigator were unchallenged at trial or by the Court of Appeals, received the Weisgram heater from the Fargo Fire Department in January of 1994, along with a set of photographs taken of the fire scene. Dolence Tr., pps. 24- 25. Thereafter, Dolence and Freeman talked about the fire scene for over an hour on the telephone in an effort to consider every possible source of the fire and narrow the focus of the investigation. *Id.* at 26-28. Dolence inspected the heater and discovered that it had sustained heavy heat damage and discoloration in the fire which he attributed to extreme heat. *Id.* at 36-37; Ex. 5, 7. This finding was consistent with the hole in the floor of the entryway directly underneath the heater. *Id.* at 38-39, 41.

[3] The District Court recognized Freeman as a qualified fire and origin expert.

Dolence found extensive heat damage inside the metal housing which served as the cover for the heater. *Id.* at 89.

Inside respondents' heater, aluminum fins dispense heat generated by the heating element. *Id.* at 163-64. The heating element is housed inside an aluminum tube and the fins are attached to the tube. *Id.* During his inspection, Dolence noted that approximately one-third of the aluminum fins on the heater survived the fire virtually unscathed. *Id.* at 54-55; Ex. 25. This evidence indicated that a portion of the heater was uncovered when the fire began and the heat from the fins was allowed to escape. *Id.* On the other hand, the melted aluminum fins clearly showed that the heat underneath the covered portion was not allowed to escape and, instead, was reflected back into the heater. *Id.*

After reviewing the fire scene photographs, examining the baseboard heater, and talking to Freeman, Dolence formed his opinions about the cause of the fire. *Id.* at 90. Those conclusions were virtually identical to Freeman's: the throw rug was pushed against the heater, igniting the glue underneath the vinyl floor. *Id.* at 50-52, 54, 105-06, 168-69, 190-91. Dolence believed that the fire began in the heater and eventually spread to the walls and ceiling in the entryway. *Id.* at 32-33, 62. As the flaming fire continued to spread, it attacked the back of the couch located on the upper level and caused smoldering combustion in the couch. *Id.* at 60-62, 65, 105-06, 174-76.

Sandy Lazarowicz, who was recognized as an expert in the properties of metal (in this instance, silver), became involved in this case at the request of Dolence as part of the investigation of the cause of the fire.[4] Lazarowicz Tr., pps.

[4] Both the regulating thermostat and high limit control contacts are made of silver. The former is used to increase or decrease the temperature by turning the dial. For purposes of this case, the regulating thermostat is essentially comprised of two silver contacts (the "moveable arm" contact and the "stationary" contact) and a "spring arm" which opens and closes the circuit. When the two contacts are together, electricity

18-19; Dolence Tr., p. 100. Dolence showed Lazarowicz the markings and serrations on the Weisgram regulating thermostat contact surface as Dolence suspected the contact had been tampered with.[5] Lazarowicz Tr., pps. 20, 23; Dolence Tr., p. 99. Lazarowicz advised Dolence that the serrations had been made during the manufacturing process. Lazarowicz Tr., pps. 23-24. He also told Dolence that there was evidence of electrical arcing and material transfer on the Weisgram contacts.[6] *Id.* at 32-34; Ex. 45, 53. Lazarowicz observed an arrowhead shaped "pullout" area on one contact (the moveable contact located on the spring arm) and a corresponding "deposit" on the other contact (the stationary contact). *Id.* at 33-34, 38; Ex. 45, 53. The arcing and material transfer on the Weisgram contacts did not represent the "normal operation" of a set of contacts. *Id.* at 55-56. Respondents' experts admitted that there was evidence of arcing and material transfer on the regulating thermostat contacts. Phy Tr., pps. 96, 119-124; Vol. VII, pps. 85-86, 122-23. According to Lazarowicz, approximately 25 percent of the silver on the moveable arm contact had been transferred to the stationary contact and this was clear evidence of welding. Lazarowicz Tr. pps. 32-34, 38; Ex. 45, 53.

Lazarowicz examined the Weisgram contacts and contacts taken from an exemplar heater taken from the adjacent town home (Ferguson heater) under stereoscopic and

flows through the heater and it produces heat. When the two contacts are separate, the heater does not carry electricity and cannot produce heat.

[5] Serrations, in this case, are defined as grooves which appear on the regulating thermostat's moveable arm contact. Although Dolence had seen "thousands" of contacts during his career as an electrician and electrical fire investigator, he had never seen serrations on a contact surface. Dolence Tr., p. 99.

[6] Arcing is defined as the electric current that is drawn between two contact surfaces, typically when the contacts separate. Lazarowicz Tr., p. 29. It has also been described as a "spark." Phy Tr., p. 121.

electron scanning microscopes. Based upon his examination of both sets of contacts, Lazarowicz concluded that the Weisgram thermostat contacts were closed, and the heater was "on," as the rug caught fire instead of shutting off at 190°F as it was supposed to do. *Id.* at 47-48. Lazarowicz pointed out numerous differences between the Weisgram and Ferguson contacts, as they were presented to him, in support of his conclusions. First, the Ferguson contacts showed much less arcing and material transfer as compared to the Weisgram contacts. *Id.* at 39-41; Ex. 85, 94.

Second, the contact surface around the arc pits on the Ferguson moveable arm contact was smooth and "glass like" but the Weisgram contact surface was irregular and very porous. *Id.* at 42-46; Ex. 88, 97. The difference in the contact surfaces was related to the temperature of the contacts when the arc strikes occurred, which shows that the Weisgram contacts opened at a much higher temperature. *Id.* at 43. In other words, the electrical arcing occurred when there was a very high external heat source - a fire - as compared to room temperature in the Ferguson contacts. *Id.* at 43-46. The Weisgram contacts separated after the temperature of the contact surfaces reached a point which allowed the metal to soften and "unweld." *Id.* at 47-51. Lazarowicz believed that the separation occurred when the contacts surface temperature reached approximately 850°F during the fire. *Id.* at 50-51. This was why the contacts were found separately after the fire. *Id.* at 73. In addition, the Weisgram contacts also had a flowing topography as compared to the Ferguson contacts' which had a jagged topography. *Id.* at 50-51. The physical evidence on the contact surfaces demonstrated that the Weisgram contacts were welded together at the time of the fire on December 30, 1993. *Id.* at 40, 112, 114. Ultimately, Lazarowicz concluded that the moveable arm contact in the regulating thermostat was defective because it contained serrations which promoted

electrical arcing and material transfer.[7] *Id.* at 30-31, 51-52, 93, 111-12.

Lazarowicz also believed the regulating thermostat contacts did not "mate" squarely but instead joined in the lower, left-hand quadrant on the moveable arm contact. *Id.* at 51-52. This pattern increased the possibility of welding and material build up in that area. *Id.* The surface incongruities on the Weisgram moveable arm contact built up over time and finally welded the contacts together. *Id.* at 32, 38, 40, 51-52. The welding of the Weisgram regulating thermostat contacts is the reason why they did not open before the fire started. *Id.* at 111-12.

Finally, the high limit control is designed to turn the heater off when it senses temperatures in excess of 190°F. Phy Tr., pps 46, 146. The high limit control contacts are always together unless there is an overheating situation. All of the experts agreed that the *high* limit control contacts did not show any of the telltale signs of ever having been activated. *Id.* at 83-84, 156; Vol. VI, pps. 51-52. The lack of electrical arcing on the high limit control contacts conclusively established that the control did not activate while the heater was operating even when the temperature in and around the heater reached, or exceeded, 190°F on the night of the fire. Lazarowicz Tr. pps. 48, 54. The high limit control did not work as designed in the Weisgram heater at the time of the fire as it did not activate and turn the heater off before the rug caught on fire. *Id.* at 53-54.

B. THE DEFECTS IN THE WEISGRAM HEATER.

The heater is a piece of equipment that is located on the floor, so it is likely that items (such as throw rugs) would

[7] Richard Moore, a representative of the successor company who manufactured the contacts in the regulating thermostat, testified that he has examined as many as 1,000 contacts made by other companies during his career and none of them had serrations. Vol. VII, pps. 92, 101-02.

come in contact with it when it was on. Those items could catch fire, potentially causing fires like this one, unless the heater shuts down when temperatures reach dangerous levels. In this case, the Weisgram heater failed to shut off when it reached high temperatures (i.e. temperatures which would ignite nearby combustibles).

The petitioner maintained at trial that the Weisgram heater contained several serious design defects which were noticed after the fire and which combined to cause the fatal fire. One design defect was in a safety feature: the placement of the high limit control capillary tube within the heater enclosure behind a deflector shield and too far away from the heat element (so that it would not shut off until it was too late). There were two defects involving the regulating thermostat; first, the moveable arm contact in the regulating thermostat contained unusual serrations from the manufacturing process which limited the contact area for electricity; and second, the contacts themselves "mated" only partially, or in one quadrant of their contact area. These design defects promoted arcing and material transfer.

As allowed by North Dakota law, petitioner proceeded to prove the defects by both circumstantial evidence and expert opinion. However, the Eighth Circuit panel majority concluded that the petitioner's expert opinions were "unreliable" because there was not any testing accomplished to support their theories. In so doing, the Eighth Circuit panel majority neglected to record that certain testing and observation of the parts was accomplished (by both parties), and neglected to appreciate that no one was able to perform many definitive tests because certain pieces of key evidence were destroyed by the fire. Phy. Tr., pps. 116-118; Vol. VII, pps. 81-82. The Weisgram heater was in pieces when it was recovered by the Fargo Fire Department. Dolence Tr., pps. 81-82, 88-89, 93-94, 203-04. The regulating thermostat was broken into multiple pieces and the high limit control had been mutilated in the fire. *Id.* at 142. With respect to the high

limit control, the diaphragm inside the bellows cup was missing. *Id.* at 93-94. The bellows cup was not attached to the capillary tube. *Id.* at 94. The pin that activates the diaphragm was missing. *Id.*

As a result of the fire damage, all parties conceded it was impossible to test each component part of the Weisgram heater completely. Phy Tr., pps. 116-18; Vol. VII, pps. 81-82. Respondents' experts conceded at trial that testing of the subject high limit control, for instance, could not prove that it worked before the fire started. Phy Tr., pps. 83-84, 156; Vol. VI, pps. 51-52. Examination of certain component parts, however, was undertaken, and significant observations were made. The high limit control did not appear to have ever activated before the fire. *Id.*

In addition, there was no way to use similar component parts to replicate the Weisgram heater which was manufactured in approximately 1977. Unimax, the company which manufactured the regulating thermostat switch that petitioner contended was defective, produced approximately 10,000 switches per day. Vol. VII, p. 114. Each switch was manually adjusted by an employee of Unimax and each one is different. *Id.* at 114-15, 121.

The tests conducted on the Ferguson heater by respondent did nothing to dispel the notion that the Weisgram heater was defective because it operated at temperatures that were far too high. In one test where the Ferguson heater was allowed to run with the regulating thermostat and high limit control in place (i.e., normal operation), the air temperature in front of the heater reached 403°F before it turned off. Ogle Tr., p. 109. In that same test, the aluminum fin tube registered a temperature of 625°F. *Id.* at 109-10. In a second test where the Ferguson heater was allowed to operate with the high limit control in place, the air temperature in front of the heater reached 417°F before it turned off. *Id.* at 110-11. In a third test where two-thirds of the Ferguson heater was blocked, the air temperature in front of the heater reached

413°F before the heater turned off. *Id.* at 112. Finally, in a test where the regulating thermostat and high limit control were removed, the air temperature in front of the heater reached 575°F and the aluminum fin tube housing the heating element exceeded 700°F.[8] *Id.* at 115-16. That temperature reading was approximately 300°F higher than the ignition temperature of a petroleum based adhesive, and approximately 250°F higher than the ignition temperature for a cellulose based rug, similar to the rug in the Weisgram home. Dolence Tr., pps. 194-95. Freeman Tr., pps. 64-65. Moreover, besides an inability to test the Weisgram heater, none of the experts were able to reconstruct or re-create the Weisgram home in order to perform any testing after the fire. Ogle, Tr., pps. 69, 103.

C. CARELESS CIGARETTE THEORY.

Although respondent did not agree with the theory of a defective heater, its principal defense at trial was that there was a different explanation for the cause of the fire, dubbed the "careless cigarette" theory. Briefly, Ogle, respondents' cause and origin expert, opined that someone dropped a cigarette between one of the cushions and the back of the couch on the evening of December 29, 1993, and a smoldering fire started. Ogle Tr., p. 46. Ogle then claimed that Bonnie Weisgram was alerted to the smoldering fire, so she took the middle cushion to the entryway. *Id.* at 36-37, 43. He claimed Weisgram, instead of throwing the cushion outside, placed the middle cushion behind the interior door and in front of the baseboard heater. *Id.* at 43-44. Ogle admitted, however, that there was no evidence of a couch cushion or charred polyurethane foam in the entryway after the fire. *Id.* at 139-40, 146. In addition, the theory was based

[8] The references to "70" degrees in the trial transcript are incorrect; the transcript should read "700" degrees

on the assumption that the middle cushion was no longer on the couch after the fire. *Id.* at 136-37, 141-46.

Ogle's theory was directly refuted by eyewitnesses at the fire scene. Freeman testified that there was no evidence of a polyurethane couch cushion in the entryway after the fire. Freeman Tr., p. 79. He did not see any charring from polyurethane foam or a zipper sewn into the couch cushions. *Id.* at 76-77, 79. Freeman also looked into the hole in the entryway and did not see any part of a polyurethane cushion. Vol. VII, p. 139-40, 149. According to Freeman, "there was no way that cushion was in that hole, any part of it. It wasn't there." *Id.* at 140. Freeman also testified that the middle cushion was still located on the couch when he investigated the fire on December 30, 1993. Freeman Tr., pps. 75-76; Vol. VII, pps. 142-44, 148-49. He saw the middle cushion on the couch after the fire "with his own two eyes." *Id.* at 148-49.

Likewise, Gerald Splitt did not see any evidence of polyurethane foam in the entryway when he took the sample next to the hole in the floor. Vol. II, p.56. He believes he would have noticed the remnants of polyurethane foam if it had been in the entryway. *Id.* at 56-57. Finally, Chad Weisgram testified that he cleaned out the closet area underneath the hole and did not see any evidence of a couch cushion. Vol. VII, pps. 151-52. The jury obviously rejected this theory regarding the cause of the fire.

PROCEDURAL HISTORY

Chad Weisgram, individually and on behalf of Bonnie Weisgram's heirs, commenced a lawsuit against Marley Company for the wrongful death of his mother. State Farm, which insured the Weisgram home, sued Marley to recover insurance benefits paid for the damage to the Weisgram town house and its contents, and (by assignment) benefits paid for the damage to the adjoining town house. The cases were consolidated and tried to a jury on the theory that Marley was

strictly liable because the baseboard heater was defective. The jury awarded $500,000 to Chad Weisgram and the heirs of Bonnie Weisgram and $100,575.42 to State Farm. Marley's post-trial motions for judgment as a matter of law and motion for a new trial followed and were opposed by the Plaintiffs.

On September 4, 1997, Chief Judge Rodney Webb for the United States District Court for the District of North Dakota issued a Memorandum and Order denying respondents' post-trial motions. In his Memorandum and Order, Chief Judge Webb found no reason to exclude the testimony of petitioners' experts and determined that adequate support existed to mark the testimony as reliable. Respondents subsequently appealed. On February 23, 1999, in a two to one decision (Judge Bright, dissenting), the Eighth Circuit panel majority vacated the judgment for petitioners after excising portions of petitioners' experts' testimony and remanded the case to the district court with instructions to grant respondents judgment as a matter of law. Judge Bright in his dissent stated:

> The majority errs in a second regard. See Maj Op. at 4 n 2. If the district court erred in admitting the testimony of the plaintiffs' experts, the relief to be awarded is a new trial, not judgment as a matter of law. In *Midcontinent Broadcasting Co., v. North Central Airlines, Inc.*, 471 F.2d 357 (8th Cir.1973), this court held a new trial is the proper remedy for an error in the admission of expert testimony. *See App. to Pet. for Writ of Cert.*, p. A-26

Further Judge Bright stated:

> This controversy represents a typical case to be decided by a jury. This court ought not overturn

> both the trial judge and the jury. *See App. to Pet. for Writ of Cert.*, pps. A-26 and A-27.

Rehearing and Rehearing En Banc were denied by the United States Court of Appeals for the Eighth Circuit on April 26, 1999. Joint App., p. 169.

Chapter 28 U.S.C. § 1332 conferred jurisdiction on the district court in the first instance. Chapter 28 U.S.C. § 1291 conferred jurisdiction on the United States Court of Appeals for the Eighth Circuit.

SUMMARY OF ARGUMENT

After concluding that the admission of certain expert testimony was erroneous and that it prejudiced respondents, the Eighth Circuit panel majority committed a series of errors in disposing of this case by directing the entry of judgment for respondents.

First, the decision on whether to permit a new trial is a decision that is committed to the discretion of the district court under Rule 59(a)(1) of the Federal Rules of Civil Procedure. As a discretionary ruling, like the decision to admit the expert testimony in the first place, it should be exercised by the trial judge who saw the witnesses and presided over the entire proceeding, not by the Court of Appeals which sees only a cold record and has much less of a sense of whether the interests of justice require a new trial. Nor is a trial judge likely to order a new trial unless there is a legitimate basis for doing so since he or she will have to preside over it and thus will not be inclined to grant a new trial unless there is indeed legitimate basis. Allowing the Court of Appeals to make such determinations also raises Seventh Amendment issues under *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

Second, as most of the other Courts of Appeal have recognized (and indeed as the Eighth Circuit held in a prior

case), it is improper to direct a verdict against the party whose favorable evidence has been excluded. The reason for that rule is that the party whose evidence has been excluded after trial may well have been able to supply alternative evidence (as was the case here), but did not do so when the primary evidence was admitted. If the rule applied by the Court of Appeals were followed, parties would have to "over-try" their cases, by offering redundant evidence (expert and otherwise) out of a concern that an appellate court might exclude some piece of evidence and then decide what is left was not sufficient to warrant a new trial.

Third, as the record in this case demonstrates, and as the district court surely would have concluded, there is ample evidence to justify a new trial. There can be no issue about the quantity and quality of the evidence on the primary issue at trial: whether the fire was caused by the heater not shutting off when the rug was pushed against it (as petitioner contended) or whether a cigarette started the fire (as respondents urged and the jury plainly rejected). Thus, the only real question on which there could be any doubt of there being sufficient evidence to go to the jury is on whether respondents' heater was defective.

On the issue of defect, North Dakota law -- which the Eighth Circuit panel majority seems to have overlooked -- is quite clear that defects in cases like this case can be established by circumstantial evidence because of the problem of reconstruction of equipment destroyed in a fire. Here, relying on objective facts not in dispute, as well as respondents' own witnesses, petitioner was able to establish, even without the excluded expert testimony, that the heater was both defectively designed and manufactured because it did not shut off at 190°F, as it was supposed to do. If it had shut off there would have been no fire. In reaching the opposite conclusion, the Court of Appeals assumed a role that should have been undertaken by the district court, and its assertions that this was "not a close case" can only have been

based on its lack of familiarity with the record, and its failure to understand the theories of defect put forward by petitioner and accepted by the trial judge when he denied respondents' post-trial motions.

Petitioner does not ask this Court to review the record and reach its own conclusion about whether petitioner met the burden on showing a defect under North Dakota law. Rather, this evidence is offered to show why the Court of Appeals erred in undertaking an independent review of the record of this two week trial and deciding that there was "no reason to give plaintiffs a second chance" to prove their case, instead of remanding to the district court for that determination, which, as in *Gasperini*, would be subject to appellate review under an abuse of discretion standard.

ARGUMENT

The Eighth Circuit panel majority first excised certain expert testimony admitted at trial as erroneous. It then ordered JAML be entered for respondents without considering argument as to why a new trial would be warranted for petitioner.

I. WHEN AN APPELLATE COURT EXCISES EXPERT TESTIMONY AS ERRONEOUSLY ADMITTED, THE DECISION WHETHER TO PERMIT THE PARTY WHO PREVAILED BELOW A NEW TRIAL SHOULD BE COMMITTED TO THE DISCRETION OF THE DISTRICT COURT.

The act of first excising expert testimony, and then ordering JAML produces a harsh and final result without an opportunity to be heard on whether a new trial is appropriate. The trial court, who personally presided over the pretrial and trial proceedings, and presumably would preside over a new

trial if warranted, is in the best position to decide if a new trial is indeed warranted.

The interests of justice would at least afford petitioner an opportunity to be heard. Therefore, at a minimum, the rule should be: when an appellate court finds the district court erred in admitting expert testimony, and the error is sufficient to overturn a verdict, the party who prevailed below, but lost on appeal, should be allowed to show the district court why a new trial, without the excised testimony, is justified, before judgment is summarily entered against him. As this Court aptly stated in *Gasperini*, 518 U.S. 415 at 438:

> Trial judges have the unique opportunity to consider the evidence in the living courtroom context' (citation omitted), while appellate judges see only the 'cold paper record' (citation omitted).

The issue here is: can petitioner ever, under any circumstances, present enough admissible evidence to create a jury issue under North Dakota law? "Appellate courts are awkwardly equipped to resolve such issues, particularly in the absence of adversary argument, (whereas) the trial judge has an extensive and intimate knowledge of the evidence and issues in a perspective peculiarly available to him alone." *United States v. Generes, et Vir.*, 405 U.S. 93, 112 (1972) (White, J., concurring) (citation omitted).

The decision as to whether to permit a new trial is a decision that is committed to the discretion of the district court under Rule 59(a)(1) of the Federal Rules of Civil Procedure. The trial judge is not likely to order a new trial unless there is a proper basis for doing so since he or she will have to preside over it. As a discretionary ruling, like the decision to admit the expert testimony in the first place, the ruling would be subject to review for abuse of discretion.

Allowing a Court of Appeals to determine that a new trial is not warranted, based upon its review of a cold, and perhaps

incomplete record also raises Seventh Amendment issues. Here, the Eighth Circuit panel majority excised testimony prior to reviewing the district court's denial of respondents' motion for JAML. Appellate review of this sort fails to attend to "an essential characteristic of [the federal-court] system." *Gasperini,* 518 U.S. at 431, (quoting *Byrd v. Blue Ridge Rural Elec. Coop., Inc.,* 356 U.S. 525, 537 (1958)). In finding that the Weisgram heater caused the fire, the jury obviously rejected any alternate cause theory advanced by the respondents. Disputed questions of fact properly remain the province of the jury. As counseled by this Court:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury, and, under the influence -- if not the command -- of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Gasperini, 518 U.S. at 432 (quoting *Byrd,* 356 U.S. at 537).

The Eighth Circuit panel majority, in this case, impermissibly judged the factual merits of the case. Appellate reexamination of this sort is forbidden by the Seventh Amendment to the United States Constitution, which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U. S. CONST., amend. VII.

Without directly referring to the Seventh Amendment issue, this Court has previously addressed a situation where the appellate court determined that there was insufficient evidence to sustain a finding of negligence and ordered judgment for the respondent. In a per curiam decision, reversing the appellate court, this Court stated:

> Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury and the jury's verdict and interrogatory answers. *Fed. Rule Civ. Proc.*, 50(d) *See*, *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75; *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 69 S.Ct. 1326, 93 L. Ed. 1704.

Iacurci v. Lummus Company, 387 U.S. 86, 88 (1967).

JAML deprives a nonmoving party of a determination of the facts by a jury. It should be granted cautiously and sparingly applied so as not to infringe on rights preserved by the Seventh Amendment. The Eighth Circuit panel majority failed to adhere to this stringent standard of review. If the Eighth Circuit panel majority's decision is affirmed, petitioner will be unfairly denied a jury trial. Petitioner should be afforded an opportunity to argue there is substantial evidence remaining which would support a verdict. The district court is in the best position to hear the argument and make the new trial decision. Therefore, at a minimum this case should be remanded to the district court for proceedings on the new trial issue.

II. THE EIGHTH CIRCUIT PANEL MAJORITY'S DECISION TO GRANT JUDGMENT AS A MATTER OF LAW TO RESPONDENT MARLEY COMPANY, ONLY AFTER EXCISING PORTIONS OF PETITIONER'S EXPERT TESTIMONY, WAS IMPROPER.

The Eighth Circuit panel majority's directive to grant respondents JAML only after excising portions of the expert testimony presented by petitioner, and admitted at trial, was error. Assuming, as we must, that the district court abused its discretion in admitting certain expert testimony during trial, the relief to be granted should be a new trial, not JAML.

Several circuits, including the Eighth Circuit, have held that a trial court in deciding a motion for JAML (and its predecessor JNOV) may not exclude from its decision making process evidence deemed erroneously admitted at trial. The logic of these decisions applies with equal, if not more, force to the cold record appellate review of a trial court's denial of a motion for JAML. An appellate court must employ the same standards as the trial court in reviewing a trial court's denial of a Fed. R. Civ. P. 50(b) motion. Therefore, it too must base its decision on the ***entire*** trial record and cannot take into account the fact that part of the evidence may have been improperly admitted.

A. THE RULE IN THE EIGHTH CIRCUIT CLEARLY IS: IF THE DISTRICT COURT ERRED IN ADMITTING THE TESTIMONY OF THE PETITIONER'S EXPERTS, THE RELIEF TO BE AWARDED IS A NEW TRIAL, NOT JAML.

In *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973), the United States Court of Appeals for the Eighth Circuit determined that "in ruling on the sufficiency of evidence, the trial court must

take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." *Id.* The Eighth Circuit reasoned that such action was inappropriate in connection with a motion for judgment n.o.v., but would be proper in granting a motion for a new trial. *Id.* at 358-359 (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249 (1940)). The rationale stated by the Eighth Circuit in *Midcontinent* is very applicable in this case:

> The subsequent ruling, after the verdict, that the expert opinion was not admissible after it had been originally received and considered by the jury, placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

Midcontinent, 471 F.2d at 359.

Because the trial court used improper standards in granting JNOV, the Eighth Circuit ordered that the judgment be set aside and that the case be remanded for a new trial. *Id.* at 360.

Inexplicably, the Eighth Circuit panel majority in the case presently before this Court ignored the precedence of its *Midcontinent* decision. Instead, the Eighth Circuit panel majority, in footnote 2 of its opinion, comments that "it can discern no reason to give the plaintiffs a second chance to make out a case of strict liability" and cites two cases where the new trial issue was not before the appellate court. *See App. to Pet. for Writ of Cert.*, pps. A-5 and A-6. Yet, petitioner here did have other experts who were not called. In addition, North Dakota law permits a jury to find product

defect based upon circumstantial evidence alone. Petitioner rested his case only after his experts, whether rightfully or erroneously, had already testified. The Eighth Circuit panel majority ruled on the cold record of the case as tried. If the excised opinions had not been admitted at trial, the case would have been tried differently. Petitioner should have the opportunity to present admissible evidence and have a North Dakota jury decide his case. At a very minimum, the trial court, who is in a better position, having presided over all of the proceedings, should hear argument and decide whether a new trial is warranted.

If the Eighth Circuit panel majority's decision is affirmed, parties will be forced to "over try" their cases because of concern that the trial court's admissions of expert testimony will be reversed on appeal. Parties will be forced to present more than one expert on each issue because the appellate court might "second guess" the expert's qualifications or opinions. A rule requiring remand for new trial determination when expert testimony is excluded will assure parties that extraordinary, duplicative, or unnecessary expert testimony will not be needed to overcome these concerns.

B. OTHER CIRCUITS HAVE FOLLOWED THE REASONING OF *MIDCONTINENT* AND HELD THAT A COURT MAY NOT, AFTER A TRIAL IS OVER, FIRST EXCLUDE EVIDENCE AND TESTIMONY AND THEN GRANT A MOTION FOR JAML.

In *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695-96 (11th Cir. 1993), the United States Court of Appeals for the Eleventh Circuit so held. In reaching its decision, the Eleventh Circuit reasoned:

> The rationale for prohibiting the district court from disregarding previously admitted evidence is

> reliance. If evidence is ruled inadmissible during the course of the trial, the plaintiff has the opportunity to introduce new evidence. However, when that evidence is ruled inadmissible in the context of deciding a motion for JNOV, the plaintiff, having relied on the evidence already introduced, is unable to remedy the situation.

Id. (citing *Midcontinent*, 471 F.2d at 358-59).

In a 1998 per curiam opinion, the United States Court of Appeals for the Ninth Circuit determined that the district court, in deciding a motion for JAML, following a remand from an appellate decision requiring the exclusion of evidence, may not exclude from its decision the evidence erroneously admitted at trial. *See*, *Elbert v. Howmedica, Inc.*, 143 F.3d 1208 (9th Cir. 1998) (per curiam).

In reaching its decision, the Ninth Circuit quoted at length from its decision in *Schudel v. General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998), which held that a trial court may not exclude evidence erroneously admitted at trial when deciding a motion for JAML pursuant to Fed. R. Civ. P. 50(b) following trial. In *Schudel* the Ninth Circuit wrote:

> We now hold that when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial was closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps, unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair;

> and the remedy of a new trial is available to put both sides on an equal footing. (citation omitted).

Schudel, 120 F.3d at 995 (citing *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992); *Sumitomo Bank of California v. Product Promotions, Inc.*, , 717 F.2d 215, 218 (5th Cir. 1983); *Midcontinent*, 471 F.2d at 38-59); *see also*, *Elbert*, 143 F.3d at 1209.

The Fifth Circuit has also held that a motion for JAML must be based on the entire trial record including evidence and testimony later deemed inadmissible. *See*, *Sumitomo Bank*, 717 F.2d at 218; *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985).

Following the decisions of the Eighth and Fifth Circuits, the Sixth Circuit also determined that it is wholly improper for a court to ignore evidence admitted at trial from its consideration in granting a judgment notwithstanding the verdict. *Douglass*, 956 F.2d at 1344. (citing *Midcontinent*, 471 F.2d at 358; *Sumitomo Bank*, 717 F.2d at 218). Because the Sixth Circuit deemed such action impermissible, it reversed the district court's grant of judgment notwithstanding the verdict. *Id.* Without overruling *Douglass*, a Sixth Circuit panel in the recent case of *Smelser v. Norfolk Southern Railway Co.*, 105 F.3d 299 (6th Cir. 1997) did as the Eighth Circuit panel majority did in this case. First it excised expert testimony under Rule 702 of the Federal Rules of Evidence and then it ordered JAML under Rule 50 of the Federal Rules of Civil Procedure. Like the case presented before this Court, this was error. *Id.* at 306 A new trial is the proper remedy for an error in the admission of expert testimony.

III. FUNDAMENTAL NOTIONS OF FAIRNESS REQUIRE THAT PETITIONER BE AT LEAST GIVEN AN OPPORTUNITY TO ARGUE THAT A NEW TRIAL IS WARRANTED.

The record in this case demonstrates that there is ample evidence to justify a new trial. As more fully stated in the Statement of the Case, petitioner presented proof of product defect by both circumstantial evidence and expert opinion. In accordance with North Dakota law, the jury was instructed that "a product defect can be shown by circumstantial evidence." Jury Instruction No. 9. Joint Appendix, A-93; *See, Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). Although the Eighth Circuit panel majority concluded that the petitioner's expert opinions were unreliable because there was no testing to support their theories, there is ample evidence in the record which would support a jury's finding that the heater was the cause and origin of the fire. The Eighth Circuit panel majority at no time questioned the qualifications of Petitioner's cause and origin fire investigators, Captain Dan Freeman and Ralph Dolence. Both of these experts personally inspected the evidence from the fire scene using accepted investigative techniques. As pointed out by Judge Bright in his dissent:

> "Fire cases differ from most accident cases because fires tend to destroy evidence of causation. As a result, theories about the cause of fires inevitably rest on circumstantial evidence. Arson and insurance cases, as well as product liability cases like this one, require expert evaluations to determine the cause of fire. The Courts traditionally permit qualified fire investigators to express opinions on the cause of fires."

App. Jt. Pet. for Writ of Cert. Pg. A-18.

In addition, petitioner had listed as a part of his case two other expert witnesses, John Gorman and Howard H. DeMatties. Joint Appendix A-71 and A-14 Docket Entry 64. If the trial court had excluded testimony of any of the experts, then petitioner would still have had the option to call Mr. Gorman and/or Mr. DeMatties to testify. That option is obviously not available because of the Eighth Circuit panel majority's ruling. The danger of an appellate court deciding in situations like this whether it is appropriate to have a new trial was made clear by this Court when it stated:

> "Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of, the trial judge's first-hand knowledge of witnesses, testimony, and issues -- because of his "feel" for the overall case. These are very valid concerns to which the court of appeals should be constantly alert."

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 325 (1967).

In this case, the Eighth Circuit panel majority decided it was "not a close case" based upon its review of the cold record, without providing petitioner an opportunity to be heard. It then ordered judgment from which, as a practical matter, there is no appeal. If this was not a close case, why was it necessary to excise expert testimony before granting JAML? Given the opportunity, petitioner would remind the appropriate court that a fire case, out of necessity, must involve circumstantial evidence. Petitioner was able to establish, even with the expert testimony excluded, that the heater was both defectively designed and manufactured because it did not shut off at 190°F as it was supposed to do.

If it had shut off, there would have been no fire. North Dakota law clearly permits a jury to find product defect based upon this circumstantial evidence alone, without expert testimony. There is ample circumstantial evidence available to support a verdict here. Petitioner tried this case as a circumstantial evidence case with supporting expert testimony. Respondents themselves elicited some of the erroneous expert testimony in cross examination. Dolence Tr., pps. 126-130, 137-39, 143, 187, 208. Additional foundation can be laid for the erroneous opinions petitioner offered on the experts who were called. Petitioner had two additional experts who could have been called before he rested.

But for this Court granting certiorari, the Eighth Circuit panel majority holding would have prevented petitioner from ever articulating these reasons for a new trial, anywhere, to anyone, under any circumstances. Fundamental notions of fairness do not allow such a result.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit as to petitioner should be vacated and the cause remanded to the district court for a new trial, or at a minimum, for proceedings to determine whether a new trial is warranted.

Respectfully submitted,

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APPENDIX

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law;

or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

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In the

Supreme Court of the United States

October Term, 1999

Chad Weisgram, et al.

Petitioner,

vs.

Marley Company, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether a federal court of appeals is authorized to order judgment as a matter of law for the defendant after determining there was no legally sufficient evidentiary basis for the jury's verdict.

INTERESTED PARTIES

The Respondent is correctly denominated as: The Marley Company, a Delaware corporation, and its division, Marley Electric Heating Company, and United Dominion Industries, Inc., a Delaware corporation.

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STATEMENT OF THE CASE

Summary of Facts and Procedural History

The facts of the fire and its aftermath are correctly stated in the court of appeal's opinion in *Weisgram v. Marley Co.*, 169 F.3d 514, 516 (8th Cir. 1999), and Marley will not repeat all of them here.[1] When firefighters entered Weisgram's home on the morning of December 30, 1993, they found a small fire burning in the entryway near the front door of the lower level of the home and Bonnie Weisgram's body lying in an upstairs bathroom. The rest of the house was filled with smoke and heat, but was not damaged by fire, with the exception of a large couch in the upstairs living room, which was mostly destroyed by fire. *Freeman*, 16-17, 27, 117, 177-78. A later autopsy revealed that Weisgram died of carbon-monoxide poisoning several hours before the fire in the entryway started and that she was intoxicated at the time of her death. *R. II*, 25, 32, 39, 41-43. Her blood also tested positive for a toxic amount of antidepressants.

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[1] Marley acknowledges that this Court's order granting certiorari is limited to the sole question of the propriety of JMAL under the circumstances of this case. The question originally presented for certiorari by the petitioners *assumed* the correctness of the court of appeal's decision to exclude the testimony of plaintiffs' experts. *Question 2, Pet. for Cert.* Petitioner has nevertheless included an extensive discussion of the expert evidence in his opening brief in this Court, and he has now asserted, for the first time in this Court, that he established, *even without the excluded expert testimony*, that the heater was defective in design and manufacture "because it did not shut off at 190° Fahrenheit." Given the posture of this case as set forth in the petitioner's brief, Marley believes a brief summary of the facts and procedural history is therefore warranted. For a more complete statement of the facts and analysis of the evidence at trial, Marley respectfully refers the Court to appellants' opening brief in the court of appeals at pages 1-24.

The investigating fireman, Freeman, focused his investigation on an electric heater manufactured by Marley that was mounted on a wall near the floor in the entryway. He did not seriously investigate the possibility of a cigarette ignition of the couch because he had mistakenly been told that Bonnie Weisgram was not a smoker and he did not see any "smoking material" in the home. *Freeman,* 31; *Dolence*, 59-60. Weisgram was last seen alive by her fiancé at 11:00 p.m. on the evening of December 29, 1993. He observed her drink an alcoholic beverage and smoke a cigarette before he left. *R. III,* 31 (*Higgs dep.*, 47-49)

Weisgram's adult son, Chad, petitioner, sued The Marley Company (Marley), respondent, in federal court for wrongful death, claiming that the baseboard heater was defective and caused the fire. State Farm, insurer of the Weisgram home, sued to recoup the amount it had paid in insurance benefits.[2]

The Heater

The Marley heater was installed in the entryway of the Weisgram home in 1979. It is a 500-watt convection-type heater; it draws cool air through the bottom vent around the heating element and circulates warm air from the top vent. *Phy,* 20-28, 105-6. The heater was equipped with two temperature-regulating devices: the thermostat control and the high-limit control. *Id.*, 36-41. The thermostat served as the primary mechanism for controlling the temperature of the heater, and it was designed to open the circuit and shut off the heater upon sensing warm air. *Id.*, 36-39. The high-limit switch was a safety feature specifically designed for the purpose of preventing overheating of the heating element during abnormal conditions such as blockage. *Id.*, 41. In addition, the heating element itself is designed so that it cannot overheat. *Id.*, 22-23; *Miner,* 17-18.

[2] After certiorari was granted, State Farm was dismissed from the appeal and it is no longer a party.

Plaintiffs' Experts

Freeman sent the Marley heater to Ralph Dolence,[3] a retired fireman, a few days after the fire. Dolence examined the remains of the heater and found no evidence of defect or malfunction. He nevertheless reported to Freeman that both the thermostat control and the high-limit safety device "failed or malfunctioned" and that the heater had "run away." At trial, Dolence admitted that when he reported to Freeman the heater was the cause of the fire, he did not even have a "theoretical explanation of the cause." *Dolence,* 115-16, 128. Undeterred, Dolence constructed an elaborate theory that called for two simultaneous and unrelated failures (of the thermostat and the high-limit switch) in the heater, blockage of the heater by a rug, and ignition of vapors under the floor. *Weisgram,* 169 F.3d at 519-20 (8th Cir. 1999). Dolence had no evidence that these things occurred, so he simply said that they did. *Id.*

State Farm named another expert, Sandy Lazarowicz, a metallurgist. After initially examining the subject heater, Lazarowicz submitted a report concluding that the thermostat contacts had remained in the closed (energized) position at the time of the fire. In his report, the only evidence he cited in support of that conclusion was a serrated pattern on the fixed side of the contact. *Report, 8th Cir. App.,* 000192. When shown the same serrated pattern on another contact that had not been in a fire, Lazarowicz admitted he had been wrong when he said the serrated pattern on the fixed contact proved

[3] Dolence, a retired fireman with a high-school education, works as a consultant for plaintiffs' attorneys, testifying that various products cause fires. *Dolence,* 121; *Dolence dep.*, 21, 31-34; *8th Cir. App.,* 000160-61.

the contacts had been closed in the fire. *Id.*, 000209. In his first deposition, Lazarowicz refused to say whether he saw evidence of welding in either the thermostat or high-limit contacts (*Id.*), but in a second deposition, Lazarowicz opined that the thermostat contacts were "welded shut" during the fire, then came "unwelded" and opened up after the fire. (There is no dispute that when Dolence first examined the heater after the fire, the thermostat contacts were open, *not* welded shut.) In his second deposition, Lazarowicz said, for the first time, that the serrations and rounded shape of the movable contacts in the thermostat were design defects. *Laz.*, 85-86. At no time did Lazarowicz find any defect in the high-limit switch. *Id.*, 84-86.

In an extensive pre-trial motion, Marley asked the district court to strike the expert testimony of Dolence, Lazarowicz and a third expert, Gorman, based on Rule 702 and on this Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993). *Rule 702 motion, 8th Cir. App.*, 000109-219. In the motion, Marley set forth at length the reasons why the testimony offered by Dolence, Lazarowicz and Gorman did not rest on reliable scientific foundation. Not only did these experts lack the educational background, training, and specialized experience — Dolence on heater design and failure analysis, and Lazarowicz on heater design and evaluation of electrical contacts — but the opinions were themselves completely devoid of any scientific support. *Id.* Dolence admitted he had not personally conducted any testing and that he was unaware of any studies done by others in support of his theory that a 500-watt heater blocked by a rug could cause a fire by igniting unidentified vapors under a 15-year old floor.[4] Similarly,

[4] Dolence had theorized that the heater was blocked by a small floor mat in the entryway and had ignited adhesive vapors under the vinyl floor. He admitted, however, that he had no evidence that a rug actually did block the heater, "no idea" what the adhesive was (or even if it was flammable), and that he had performed no tests to support his theory that adhesive could vaporize and be ignited by a blocked heater. *Marley's 702 Motion, 8th Cir. App.*, 00017-19; *Dolence dep., 8th Cir. App.*, 000159-67.

Lazarowicz admitted he had conducted no testing himself and proffered no testing by others or any other support for his conclusion that silver contacts had "welded" and then later "unwelded." Lazarowicz admitted he was not an expert in contact theory or design and that had no professional experience in testing them.[5]

During the pre-trial hearing on Marley's *Daubert* motion, the district court acknowledged its duty to act as a gatekeeper, but denied the motion, based on its mistaken impression that *Daubert* only applied to "new science" and on its mistaken belief that "bare assertions *are* the proper subject of expert opinions." *Pret. tel. conf.*, 16-17. Marley advised the district court that the Eighth Circuit's opinions had clearly settled this issue and had applied *Daubert* to exclude expert theories that had not been subjected to testing, peer review, or the other indicia of reliability described in *Daubert*. *Id.*

The Trial

Plaintiffs' Expert Testimony

The district court denied Marley's motion to preclude Lazarowicz and Dolence from testifying. *F. pret. conf.*, 11. The case was tried to the jury on a theory of strict liability. The plaintiffs abandoned their negligence theory before trial.

[5] Marley did not include the fire investigator, Freeman, in its *Daubert* motion because plaintiffs had listed Freeman in the Magistrate's pre-trial order only as a fact witness and not as an expert. Marley did move to preclude a third expert, John Gorman, whom plaintiffs had identified, on the ground that his opinions were based on pure speculation, and not supported by any facts, testing, or scientific principles. *Rule 702 motion, 8th Cir. App.*, 000119-123.

At trial, over Marley's objections, the district court permitted the plaintiffs to present expert testimony from the fire investigator, Dan Freeman, as well as from Dolence and Lazarowicz.[6] Plaintiff voluntarily chose not to call Gorman.[7]

At the close of plaintiffs' evidence, Marley moved for a directed verdict, arguing that, under Rule 50, plaintiffs' experts' evidence on causation was based on "speculation" and was therefore "void." Also, since the experts had not identified a specific defect or mechanism of causation, Marley argued there was no basis upon which a jury could conclude that the Marley heater caused the fire. *R. VI,* 4. The court denied the motion. *Id.,* 5.

Marley's Expert Testimony

Marley's experts described the physical evidence proving that the heater was not defective and had not caused the fire, but had only been damaged by heat from an external fire source. Marley engineer, Mike Phy, explained that the thermostat contacts, the components that open and close the circuit, were not welded or stuck together, as Lazarowicz had opined. *Phy,* 40-41.

Richard Moore, a highly-qualified engineer who had spent his entire professional life designing, studying, and testing contacts, explained that the thermostat contacts in the Marley heater could not possibly have welded in a 2-amp application because the switch was designed and tested for an extended electrical life at 22 amps. *R. VII,* 61-64, 77-78. At an electrical load of only 2 amps, Moore said exemplar

[6] Plaintiffs' experts' theories at trial are set forth in detail in Marley's opening brief in the Eighth Circuit at pages 14-20.

[7] Marley had filed a separate motion to preclude Gorman from testifying based on his failure to comply with Rule 26(a)(2) F.R.Civ.P. *Clerk's Docket No.* 33; *8th Cir. App.,* 00006.

contacts he tested could not be made to weld under any test conditions. *Id.,* 63. Moore explained that, if the contacts had welded, as Lazarowicz had opined, the contact surfaces would have shown the unmistakable characteristics of a ductile fracture, features that are well understood and recognized by competent material scientists. *Id.,* 67-68. The contacts in the Weisgram thermostat, he said, did not show the features of a ductile fracture because they did not and could not weld. *Id.,* 68.[8]

Marley's Rule 50 Motions

At the close of all the evidence, Marley renewed its Rule 50 motion for directed verdict on the ground that plaintiffs had failed to meet their burden of proof of defect or causation. *R. VII,* 160-161. The trial court again denied the motion. The jury returned a verdict for the plaintiffs. *Verdict, J.App.,* 161.

Marley then moved for judgment as a matter of law, or in the alternative, for a new trial, in accordance with Rule 50(b) F.R.Civ.P. In its brief in support of the post-trial motions, Marley set forth at length its arguments in support of judgment as a matter of law. *Post-trial motions, 8th Cir. J.App.,* 000294-331. At no time did Weisgram or State Farm seek a conditional new trial under the provisions of Rule 50(c) F.R.Civ.P. Again, the district court denied the motions and entered judgment for the plaintiffs on the jury verdict. *Order A-28, Pet. for. Cert.*

The Appeals

Marley appealed, claiming that its post-trial motions should have been granted. Marley's briefs in the Eighth

[8] Marley's expert testimony at trial is set forth in greater detail in Marley's opening brief in the Eighth Circuit at pages 20-24.

Circuit again set forth extensive factual and legal reasons why Marley was entitled to judgment as a matter of law under Rule 50. Marley argued that plaintiffs' case was not legally sufficient evidence under Rule 50 because Dolence's entire theory of fire causation was a fabrication and Lazarowicz had never even tried to explain how the thermostat contacts, even if they had "stayed closed" as he had opined, could have caused a fire, given Michael Phy's unrefuted testimony that the Marley heater was designed so that the temperature could not continue to rise, even if the thermostat contacts had failed to open. *Appellants' 8th Cir. O.Br.*, 27-36; *Reply Br.*, 1-21.

In response, Weisgram and State Farm, as appellees, never addressed the possibility that the verdict would be set aside and JMAL would be granted. They never intimated in the court of appeals that they wished to invoke the provisions of Rule 50(d), which expressly reserves to the verdict winner the right to urge that the court of appeals grant a new trial should the jury's verdict be set aside. Instead, they only urged the Eighth Circuit to uphold the jury's verdict.

Stating that it had "very carefully" reviewed the "entire transcript of the trial," the Eighth Circuit held that the evidence at trial was not legally sufficient to prove by a preponderance "that the heater was defective at the time Marley sold it, much less that any purported defect rendered the heater unreasonably dangerous and proximately caused the fire that resulted in the tragic death of Bonnie Weisgram . . . ." *Weisgram,* 169 F.3d at 517. The court concluded that neither Freeman nor Dolence were qualified under Rule 702 to testify that the heater was defective, and that Lazarowicz's testimony about the defective thermostat contacts and placement of the high-limit control was not sufficiently reliable under Rule 702 to have been admitted into evidence. Finding that these witnesses offered the only evidence of defect and that their testimony had a "substantial influence on the jury's decision," the appellate court held that Marley's post-trial motion for

JMAL should have been granted. *Id.*, 522. The Eighth Circuit vacated the judgment for the plaintiffs and remanded the case to the district court with instructions to grant Marley judgment as a matter of law.

Weisgram and State Farm petitioned for rehearing and rehearing en banc, but they never proffered any grounds for the court of appeals to grant a new trial. Nor did they suggest there were any circumstances that required the appellate court to remand to the district court the issue of the propriety of a new trial. Instead, Weisgram and State Farm simply echoed Judge Bright's dissenting view that a new trial is always required if the district court erred in admitting the testimony of the plaintiffs' experts.

After the petition for rehearing was denied, Weisgram and State Farm sought a writ of certiorari, presenting the question whether the court of appeals could properly grant JMAL to Marley after determining that plaintiffs' experts' testimony should have been excluded at trial. Even in their petition for certiorari, Weisgram and State Farm offered no showing of grounds for a new trial that they contended should have been passed upon by the trial court. Once again they simply argued that this Court should grant certiorari to promote "uniformity of decisions" and to "resolve conflicts between the circuits on this issue." *Pet. for Cert.*, 11.

In his brief on the merits to this Court, petitioner Weisgram has now suggested for the first time that he has a ground for a new trial: he might have called "two other expert witnesses" or laid "additional foundation" for the "erroneous opinions petitioner offered on the experts who were called." *Pet. Br.*, 29-30. Petitioner also suggests in his brief at page 22 that the case should be remanded so that he could be "afforded an opportunity to argue there is substantial evidence remaining which would support a verdict." This Court declined to grant certiorari to review petitioner's question number one regarding the sufficiency of his evidence. Hence,

petitioner's argument that he must be afforded another opportunity to make his case on circumstantial evidence is not properly before this Court.

Disputed Points in Petitioner's Statement of the Case

Marley disputes many of the points in Weisgram's recitation of the evidence regarding the cause of the fire and alleged heater defects. But the admissibility of plaintiffs' experts' theories and opinions is not before this Court, and therefore Marley will not attempt a point-by-point refutation of the inaccurate items. Rather, Marley would refer the Court to its analysis of the record in its opening brief in the Eighth Circuit at pages 1-24.[9]

A few points require mention. At pages 6-7 of the brief, Weisgram reiterates the Dolence/Freeman thesis that a throw rug in the entryway was "pushed up" against the heater, "trapping" its heat and igniting adhesive under the floor. By stating these theories as fact, Weisgram fails to come to grips with the Eighth Circuit's conclusion that these very theories were nothing more than fabrications and "rank speculation." *Weisgram*, 169 F.3d at 520.

At page 10 of the brief, Weisgram recites Lazarowicz's claim that the thermostat contacts were temporarily "welded together" at the time of the fire, despite the fact that they were not welded, but separate, when Dolence first examined the heater after the fire. It is true that Lazarowicz told the jury that the contacts were welded together, even though in his first deposition he had adamantly refused to say whether he could see evidence of welding. *Weisgram*, 169 F.3d at 521. But saying contacts welded does not make it so, and

[9] The accuracy of the statement of facts in Marley's opening brief is not disputed. By failing to take issue with any of it in their own brief, Weisgram and State Farm conceded its accuracy.

Lazarowicz came into the courtroom armed with nothing more than his *ipse dixit*. As the Eighth Circuit pointed out in its opinion at 169 F.3d 520-21, Lazarowicz had no background or experience in electrical contacts and he knew "practically nothing" about how the heater worked.[10] *Id.* Weisgram fails to address the Eighth Circuit's conclusion that Lazarowicz was not competent to testify the contacts had welded where he was unaware of the heater's wattage or the amperage it drew, and where he had performed no tests to determine whether it was even "theoretically possible" for the contacts to weld in this 2-amp application. *Id.*[11]

At page 12 of the brief, Weisgram's reference to the "unusual serrations" on the thermostat contacts as a design defect merits a brief comment. Lazarowicz's sole basis for calling the serrations a defect was that, in the three-to-four dozen contacts he had seen in his lifetime, none had serrations. *Laz.*, 94. Lazarowicz admitted he had never read any literature from any source that suggested the serrated design was a defect (*Id.*, 96), and said he did not need to know the manufacturer's design criteria for the contacts nor the design purpose of the serrations. *Id.*, 107.[12] The sum total of

[10] Lazarowicz's sole basis for claiming the thermostat contacts welded was his comparison of the Weisgram contacts with the exemplar Ferguson contacts. In reality, neither the Weisgram nor the Ferguson contacts showed any evidence of welding. They both showed absolutely normal contact wear, with no sign of welding or sticking. *Phy*, 40-41; *Moore, Acampora, R. VII*, 61-64, 77, 126-28.

[11] Marley introduced uncontroverted scientific testing through exceptionally qualified witnesses that at an electrical load of only 2 amps, exemplar contacts could not be made to weld under any test conditions. *R.VII*, 61-64, 108-11.

[12] In fact, the switch manufacturer, Unimax, and its successor have made about three million switches per year since the 1950's comparable to the one at issue in this case, *all* of them with serrations. The manufacturer added serrations to the contact surface as an enhancement to contact

Lazarowicz's basis for calling the serrations a design defect was his statement that serrations "wouldn't be a plus benefit at this time." *Id.*, 94. The court of appeals was correct in concluding that Lazarowicz's opinions amounted to no more than "subjective belief or unsupported speculation." *Weisgram,* 169 F.3d at 521.

Weisgram's claim at page 11 of the brief that the lack of electrical arcing on the high-limit contacts "conclusively established that the control did not activate . . . even when the temperature in and around the heater reached or exceeded 190° Fahrenheit" is a misrepresentation of the record. In fact, the lack of arcing does *not* establish that the high-limit did not open as it was designed to open at 190°, but merely proves that when the high-limit switch opened as it was designed to open, the heater was not carrying current. In other words, the heater was not running. Lazarowicz admitted this basic fact several times during the trial. *Laz.*, 83-84, 113, 115. He conceded he did not know the temperature at which the high-limit opened during the fire. He also admitted that he could have tested the Ferguson exemplar to see if it opened at 190°, as designed, but he did not perform the test. *Id.*, 115.[13]

Weisgram's suggestion on page 13 of the brief that Marley's testing did not "dispel the notion" that the heater was defective is misleading. In fact, Marley's testing program demonstrated that the high-limit switch cycled exactly as it was designed to cycle and that the overall temperatures seen

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performance: "it tends to keep the resistance down for running low current." *R. VII,* 112-13.

[13] Dr. Russ Ogle, an independent chemical engineer retained by Marley, did check the function of the Ferguson exemplar high-limit switch in an oven and proved that it cycled normally at the set point of 190° Fahrenheit. Lazarowicz conceded at trial that he had never identified either a design or a manufacturing defect in the high-limit control in the Weisgram heater. *Laz.*, 84-86.

by the heater were far too low to pose a fire hazard.[14] *Ogle,* 79-84. Weisgram failed to answer the Eighth Circuit's observation that it was Dolence's own temperature tests that established there was no defect in the heater's design. *Weisgram,* 169 F.3d at 520. After checking the temperatures in the Ferguson exemplar, Dolence conceded there were no defects in the heater because he tried but could not make the 500-watt heater overheat, even at maximum output. *Id.*

Contrary to plaintiffs' suggestion at page 14 of his brief, Marley's principal defense at trial was that the heater was not defective in any respect and did not cause the fire. In fact, Marley presented uncontroverted scientific evidence at trial through competent expert testimony that: (1) the working components in the heater (the thermostat, high-limit, and heating element) had all functioned normally; (2) the thermostat contacts were not capable of welding together at 2 amps; and (3) this 500-watt heater was not capable of generating enough heat to ignite anything near it in the manner plaintiffs' experts had theorized.

At page 15 of the brief, Weisgram suggests that Ogle's test program proving that the fire patterns in the Weisgram couch were indistinguishable from patterns left by smoldering-cigarette ignition was refuted by eye witnesses at the scene. Since State Farm did not preserve the couch or the fire scene, Ogle's opinions were based on the Fargo Fire Department's and State Farm's photographs of the scene. *Ogle,* 149-151; *Ex.* P-9, P-217; See also, *Weisgram,* 169 F.3d 519, N.5.

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[14] Plaintiffs challenged neither Dr. Ogle's qualifications nor the scientific methodology he employed in his testing program.

SUMMARY OF THE ARGUMENT

The court of appeals's decision to grant Marley judgment as a matter of law should be affirmed. The only question before this Court is whether the Eighth Circuit had the authority to grant JMAL to Marley after it concluded Weisgram's evidence was legally insufficient to sustain the jury's verdict. The answer is clear: the court of appeals does have the power to grant JMAL in this case under the Constitution, the congressional grant of authority to appellate courts, under Rule 50 of the Federal Rules of Civil Procedure, and under the case law of this Court, of the Eighth Circuit, and of most of the other circuits which have addressed the issue.

The reasons petitioner has put forth in support of his position that a new trial is required are without merit and are contrary to the established case law of this Court under Rule 50 F.R.Civ.P. Contrary to Weisgram's contention, Rule 59(a)(1) F.R.Civ.P. does *not* require remand to the district court for a decision as to a new trial under these circumstances. Rule 50, not Rule 59, is controlling here, and it sets forth specific procedures for the court of appeals and the parties to follow where, as here, a district court errs in denying a defendant's motion for JMAL. These procedures were explained in detail in this Court's holding in *Neely v. Martin K. Eby Constr., Co.*, 386 U.S. 317 (1967).

Contrary to Weisgram's argument, allowing the court of appeals discretion to determine whether to grant JMAL or a new trial does not raise Seventh Amendment issues. Rather, exactly the opposite is true. This Court has specifically held, in a decision that has been continuously followed by the courts for over thirty years, that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial. *Neely*, 386 U.S. at 321-22. There is no constitutional bar to an appellate court granting judgment as a matter of law. *Id.*

Weisgram's argument that the court of appeals's exclusion of expert testimony before granting JMAL was "harsh" because it unfairly deprived him of his opportunity to be heard is equally unpersuasive and it is contrary to the record. Weisgram actually had a full and fair hearing of his case. He had several opportunities to be heard on the matter of his grounds for a new trial, if any, starting with the first time Marley moved for judgment as a matter of law at the close of plaintiffs' evidence. Contrary to Weisgram's suggestion, his brief in this Court was *not* his first opportunity to proffer his reasons for a new trial — Rule 50 and the case law of this Court set forth specific procedures for a verdict winner to follow when his or her opponent moves for JMAL. Despite the existence of these established rules and procedures, Weisgram and State Farm chose not to avail themselves of Rule 50(c) when Marley moved for JMAL in the district court, and chose not to invoke Rule 50(d) when Marley appealed the district court's denial of JMAL to the Eighth Circuit.

Since Weisgram never requested a conditional new trial, at either the district or the appellate court level, it is too late for him to raise the issue for the first time in his present brief to this Court. In *Neely* and the cases which follow it, this Court has repeatedly said it will not consider issues which were not presented to the court of appeals and which are not properly presented for review. *Id.* at 330.

There are no special circumstances in this case that would create an exception to the general rule giving federal appellate courts the discretionary power to fashion appropriate relief under the circumstances of the case pursuant to 28 U.S.C. § 2106 and this Court's holding in *Neely*. Judgment as a matter of law was one of the options available to the appellate court. The Eighth Circuit properly exercised its discretionary authority in directing it, after first completing a thorough review of the trial record.

Weisgram's suggestion that this Court ought to give him a "second chance" to prove his case by circumstantial evidence lacks merit for several reasons: (1) the Eighth Circuit already reviewed Weisgram's claimed circumstantial proof and found it deficient; (2) Weisgram's contention that he established a defect in the high-limit switch by circumstantial proof is contradicted by his own expert's concession at trial that the condition of the high-limit was consistent with a normal switch in a heater that was not running; and (3) the quantum of Weisgram's circumstantial proof is not an issue properly before this Court.

There is no reason to set aside the Eighth Circuit's judgment to allow the district court the initial opportunity to address the new trial question. *Neely* allows the court of appeals to consider the question "in the light of its own experience with the case." *Id.*, 329-30. The Eighth Circuit performed its duty in this regard and it addressed the question of granting Weisgram a new trial in its opinion.

The automatic retrial rule that Weisgram is advocating in this case emanated from the Eighth Circuit's 1973 decision in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357 (8th Cir. 1973). The Eighth Circuit has rejected *Midcontinent's* rationale, refusing to follow it in *Wright v. Willamette*, 91 F.3d 1105 (8th Cir. 1996) and in the present case. Although the Fifth and Sixth Circuits had initially adopted *Midcontinent's* rule, both Courts have now disavowed it. In determining that its own precedent based on the *Midcontinent* rationale was no longer controlling, the Fifth Circuit observed that it "reflect[ed] a pre-*Daubert* sensibility."[15] In short, *Midcontinent's* rationale was misguided from the beginning and the other circuit courts are now openly criticizing it. It is time to put *Midcontinent* to rest.

[15] *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 992 (5th Cir. 1997).

Finally, adopting the automatic retrial rule that Weisgram promotes would cause needless confusion in the federal courts that have been attempting to discern and apply this Court's *Daubert* philosophy. It would make no sense to instruct the courts on the one hand that an expert's opinion is inadmissible unless it has "a reliable basis in the knowledge and experience of his discipline,"[16] and then to inform them that if the trial judge should err in allowing the jury to hear unreliable testimony, the plaintiff must be rewarded with a new trial.

The Eighth Circuit did not abuse its informed discretion in granting JMAL to Marley. Its decision should be affirmed.

[16] *Daubert, supra*, 509 U.S. at 592, 113 S.Ct. at 2786.

ARGUMENT

I. The Eighth Circuit had the Power to Direct Entry of Judgment as a Matter of Law to Marley.

The petitioner has asked this Court to determine whether the Eighth Circuit could properly grant JMAL to Marley after determining the district court abused its discretion in admitting expert testimony and concluding that the plaintiff did not have sufficient evidence of defect or causation to support the verdict. The answer is an unequivocal "yes." This Court's decision in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 74 (1967) examined and settled the question whether the court of appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may direct entry of judgment for the defendant.

A. Congressional Grant of Authority

This Court concluded in *Neely* that Congress's grant of appellate jurisdiction to the courts of appeals "is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal." *Id.*, 322. The Court cited 28 U.S.C. § 2106, which provides broad authority to the appellate courts:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (citing *Bryan v. United*

> *States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950)). *Neely*, 386 U.S. at 322.

B. Constitutional Authority

Neely also settled the question whether there is a constitutional bar to an appellate court granting judgment as a matter of law. After reviewing the prior decisions of this Court before the adoption of the Federal Rules in 1938, this Court concluded "it is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Id.*, 320-22.

C. Rule 50(d) Authorizes the Court of Appeals to Enter Judgment as a Matter of Law in Appropriate Cases

This Court's decision in *Neely* also resolved all doubt as to whether Rule 50(d) F.R.Civ.P. is applicable in cases such as this one, where the district court has denied a defendant's motion for judgment as a matter of law. Under these circumstances, *Neely* held that "Rule 50(d) is permissive in the nature of its direction to the court of appeals: . . . there is nothing in Rule 50(d) indicating that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Id.*, 323-24.

In *Neely*, this Court determined that the Tenth Circuit's decision to grant the respondent judgment n.o.v. was appropriate because the court of appeals had determined that petitioner Neely did not have sufficient evidence to support her verdict. In that case, Neely, like Weisgram in this case, had suggested no grounds for a new trial in the event her judgment was set aside. Neely, like Weisgram, had argued the court of appeals had *no power* to direct entry of judgment for the respondent. *Id.*, 330. The Court rejected this view and

held that the court of appeals had properly exercised its discretion to order entry of judgment for the respondent after considering the new trial question in light of its own experience with the case.

Neely set forth this Court's view of proper practice under Rule 50(c) and (d). It instructs that in cases such as the present one, the verdict winner has three opportunities to argue why he or she would be entitled to a new trial should the judgment be set aside: (1) plaintiff may "bring his grounds for new trial to the trial judge's attention when defendant first makes an n.o.v. motion;" (2) "he may argue this question in his brief to the court of appeals;" or (3) "he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed." *Id.*, 328-29.

Similarly, in the present case, petitioner Weisgram had several opportunities pursuant to Rule 50 practice as outlined by *Neely* to suggest any grounds he may have had for a new trial should Marley succeed in having the verdict set aside in either the trial court or in the court of appeals. But Weisgram failed to do so. Since Weisgram, like the petitioner in *Neely*, suggested no grounds for a new trial in either the district court or in the court of appeals as required by Rule 50, it is too late to raise them now, for the first time, in his present brief in this Court.

In *Neely*, this Court saw no cause "for deviating from [its] normal policy of not considering issues which have not been presented to the court of appeals and which are not properly presented for review." *Id.*, 330 (citing Supreme Court Rule 40(1)(d)(2)). Similarly, in the case at hand, Weisgram has presented no good reason for this Court to deviate from its normal policy. Considering that Rule 50's procedures and *Neely's* clear instructions have been settled law for over thirty years, Weisgram's complaint in his brief that he has had no opportunity to be heard is unfounded.

II. Judgment as a Matter of Law was the Appropriate Disposition in this Case

Contrary to Weisgram's suggestion, there are no special circumstances in this case that take it out of the general rule granting federal appellate courts the broad discretionary authority to fashion whatever relief "may be just under the circumstances," including the power to direct entry of judgment as a matter of law for the defendant. See, 28 U.S.C. § 2106 and *Neely*, 386 U.S. 322. Directing judgment for Marley *was* just under the circumstances of this case.

A. The Eighth Circuit Evaluated Plaintiffs' Circumstantial Proof and Found it Wanting

Weisgram claims this Court ought to give him a "second chance" to prove his case by circumstantial evidence. *Pet. Br.*, 18-19, 28-29. The argument is without merit.

All of Weisgram's evidence, including any alleged circumstantial proof, was carefully examined, evaluated, and passed on by the Eighth Circuit under its *de novo* review of all the evidence pursuant to Marley's appeal from the denial of its motion for JMAL. The Eighth Circuit "view[ed] the evidence in the light most favorable to Chad Weisgram and State Farm." *Weisgram*, 169 F.3d at 516-17 (citing *Finley v. River N. Records, Inc.*, 148 F.3d 913 (8th Cir. 1998)). After considering all of the evidence, the court of appeals nevertheless concluded plaintiffs' entire liability proof was based on speculation, which has never provided "substantial evidence" to support a verdict in the Eighth Circuit. See, e.g., *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 640-46 (8th Cir. 1978) (substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or a possibility).

Weisgram made his case for circumstantial evidence, including his present argument that the panel majority "overlooked" or "misunderstood" his circumstantial proof, at pages 1-10 of his petition for rehearing and rehearing en banc. By denying the petition, the court of appeals concluded Weisgram had not offered a good reason for the court to deviate from the panel majority's finding that Weisgram's entire proof at trial was based on unsupported speculation and conjecture.

Contrary to the assertion on page 18 of petitioner's brief, Weisgram did *not* establish that the heater was defective in design and manufacture "because it did not shut off at 190° Fahrenheit." This statement in the brief, unsupported by citation to the transcript, misstates the record. Lazarowicz conceded on the witness stand at trial that the condition of the high-limit switch after the accident, specifically the absence of arc marks on the high-limit contacts, was consistent with Marley's explanation that the heater was *not running* at the time of the fire. *Laz.*, 83, 113-15. There were no arc marks because the high-limit switch was not called upon to open under power. [17]

There is no reason to vacate the Eighth Circuit's judgment to give Weisgram a "second chance" to prove his product liability claim by circumstantial evidence. The circumstantial evidence issue was fully reviewed and resolved by the court of appeals. That decision can only be set aside for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990).

Finally, the issue of Weisgram's quantum of circumstantial proof of defect and causation is not properly

[17] See also, *Phy*, 50-52. (The high-limit contacts in the Weisgram heater were clean and showed no evidence of a parting arc because the heater had never been subjected to a blockage and had never been called upon to cycle under current).

before this Court. The Court declined to grant certiorari on that issue in Weisgram's petition.

B. The Court of Appeals Considered the New Trial Question in Light of its own Experience with the Case.

At page 20 of his brief, Weisgram urges this Court to fashion a rule for instances when the appellate court determines the district court erred in admitting testimony. He suggests the verdict winner should be given an opportunity to show the district court why a new trial, without the excised testimony, is justified. Putting aside the problem that Weisgram never *asked* the court of appeals for a new trial nor set forth grounds for one, Weisgram's argument lacks merit because it presupposes that the court of appeals failed to *consider* the new trial question. The premise is false. The Eighth Circuit did consider whether Weisgram and State Farm ought to have another opportunity to make their case.

Neely instructs that it was "incumbent on the court of appeals to consider the new trial question in the light of its own experience with the case, even without a motion or other request from the petitioner to do so." *Id.*, 329-30. In *Neely*, this Court said that it would "not assume that the [court of appeals] ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question." *Id.* In the present case, there is no reason whatever for this Court to assume that the Eighth Circuit ignored its duty to consider the new trial question in light of its own experience because the Eighth Circuit *did* expressly deal with the issue in its opinion. The Eighth Circuit specifically considered and rejected the opportunity to exercise its discretion under Rule 50(d) to remand for a new trial. Based on its *own* experience with the record, the court found no reason to give Weisgram and State Farm "the

opportunity to reopen discovery and identify additional witnesses who might testify to their theory of liability." *Weisgram,* 169 F.3d at 517, n.2.

III. The Eighth Circuit's Holding is the Better Rule, in Harmony with this Court's Decision in *Kumho Tire* and with Well-Reasoned Opinions in the Other Circuit Courts

A. The Decision Embodies this Court's Post-Daubert Philosophy

The Eighth Circuit's decision to grant JMAL to Marley should be affirmed not only because the court of appeals properly exercised its discretion, but because the decision itself embodies the sound application of this Court's post-*Daubert* philosophy.

Contrary to Weisgram's argument at page 23-25 of his brief, the Eighth Circuit's directive to grant JMAL was *not* error, and was *not* in conflict with Eighth Circuit and other circuit court precedents. Quite the opposite is true. The *Midcontinent* line of cases that Weisgram suggests is controlling of the outcome here has been rejected by the Eighth Circuit and has been disavowed, if not outright overruled, in the other circuit courts that have followed this Court's post-*Daubert* philosophy. Quite simply, *Midcontinent* and its progeny are no longer good law in most of the federal circuits.

According to the petitioner's brief, *Midcontinent* would automatically require a new trial in every case where the district court or the appellate court determined that expert testimony, once let in, should have been excluded for unreliability or any other reason. *Pet. Br.,* 23-25. But this rationale directly contradicts the broad discretionary power granted to the federal courts of appeal under 28 U.S.C. §

2106, under this Court's holding in *Neely*, and under the express language of Rule 50(a), which allows only "legally sufficient" evidence to defeat a motion for JMAL. It also defies common sense, fundamental fairness, and the rule against two bites of the apple.

The Eighth Circuit rejected *Midcontinent's* rationale in *Wright v. Willamette,* 91 F.3d 1105 (8th Cir. 1996) when it held that judgment as a matter of law for the defendant, not a new trial, was the appropriate disposition where plaintiffs' expert testimony on causation was "simply speculation" and, as a result, the plaintiffs failed to carry their burden of proof at trial on the issue of causation. *Id.,* 1108. In *Weisgram,* relying on *Wright*, the Eighth Circuit again firmly rejected the *Midcontinent* rationale when it expressly considered granting a new trial to the plaintiffs, but refused to do so, finding no reason to reopen discovery where Weisgram and State Farm had had their day in court. *Weisgram,* 169 F.3d 517.

Other circuit courts in the post-*Daubert* era have reached the same conclusion as the Eighth Circuit — that *Midcontinent* and its progeny should no longer be controlling when Rule 702 and *Daubert's* reliability criteria are applied to screen unreliable expert testimony at the gate. In *Watkins v. Telsmith, Inc.,* 121 F.3d 984 (5th Cir. 1997) the court of appeals affirmed the district court's decision to grant JMAL to Telsmith after excluding the testimony of Watkin's expert, an engineer, because he had insufficient experience with the design of a conveyor system to offer a reliable expert opinion. *Id.,* 987-88. The Fifth Circuit held that, without the expert testimony, Watkins had not produced sufficient evidence of product defect to survive a motion for JMAL. *Id.,* 991-93.

In determining that JMAL was the appropriate disposition, the Fifth Circuit considered Watkin's argument that *Dixon v. International Harvester Co.,* 754 F.2d 573, 579 (5th Cir. 1985) — one of *Midcontinent's* progeny and one of the cases Weisgram has cited to this Court as controlling the

outcome here — required a new trial. The Fifth Circuit rejected the notion that Watkin's expert's testimony should have been considered in ruling on the motion for JMAL. It concluded that *Dixon* was *not* controlling, saying that "the opinion's emphasis on qualifications over reliability of the expert testimony reflect a pre-*Daubert* sensibility." *Id.*, 992. In *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 1173, 143 L.Ed. 2d 238, 249 (1999), this Court cited with approval *Watkin's* holding that *Daubert* applied to engineering testimony.

Even though the *Weisgram* decision predated *Kumho* by a few weeks, the Eighth Circuit had already held that *Daubert* applied to engineering and other technical testimony. *Peitzmeier v. Hennessy Indus., Inc.,* 97 F.3d 293, 296-98 (8th Cir. 1996), cert. denied, 520 U.S.1196, 117 S.Ct. 1552, 137 L.Ed. 2d 701 (1997) (affirming summary judgment for the defendant after the district court determined plaintiff's expert testimony was inadmissible), *Pestel v. Vermeer Mfg. Co.,* 64 F.3d 382 (8th Cir. 1995) (evidence of expert's proposed alternative design excluded on the basis of *Daubert*).

The Eighth Circuit's decision to grant JMAL to Marley after determining that the district court had abused its wide discretion in admitting expert testimony based on "rampant speculation" is in harmony with this Court's decisions in *Daubert, Joiner,*[18] and *Kumho Tire. Kumho Tire* clarified that *Daubert's* gatekeeping obligation applies to *all* expert testimony and reiterated *Joiner's* holding that abuse of discretion is the appropriate standard of review.

In *Weisgram,* the Eighth Circuit explained that it was following *Joiner* precisely when it concluded that the nexus between Lazarowicz's observations of the contacts and his conclusion that the heater was defective was not scientifically

[18] *General Electric Co. v Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed. 2d 508 (1997).

sound. Finding "simply too great an analytical gap between the data and the opinion proffered," the Eighth Circuit concluded that the district court abused its considerable discretion in allowing the testimony. *Weisgram,* 169 F.3d at 521. As Justice Scalia noted in his concurring opinion in *Kumho Tire*, "trial court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function." *Kumho,* 119 S.Ct. at 1179, 143 L.Ed. 2d at 256-57.

The Eighth Circuit concluded that the district court did abandon its gatekeeping function in sending rampant expert speculation to the jury. Judgment as a matter of law was the only appropriate remedy when Weisgram and State Farm failed to meet their burden of proof of defect and causation with legally sufficient evidence.

B. The Decision is in Harmony with Well-Reasoned Post-Daubert Decisions in Other Circuit Courts

Other circuit courts that have adopted this Court's philosophy that *Daubert* applies to *all* expert testimony have not hesitated to grant JMAL to the defendant after excluding unreliable expert testimony.

In *Bogosian v. Mercedes-Benz of North America, Inc.,* 104 F.3d 472 (1st Cir. 1996), the district court granted defendant's motion for JMAL at the close of plaintiff's case in chief, after excluding as unreliable the proposed testimony of plaintiff's expert and finding that, without it, plaintiff had failed to establish the defendant's standard of care, an essential element of the plaintiff's case. The First Circuit affirmed JMAL after reviewing the record and concurring that the plaintiff had failed to present admissible evidence of the standard of care after the expert testimony was excluded. See also, *Tokio Marine & Fire Insurance Co. v. Grove Manufacturing Co.,* 958 F.2d 1169 (1st Cir. 1992) (granting

judgment as a matter of law to the defendant was not an abuse of discretion where the district court refused to qualify plaintiff's liability expert).

The Third Circuit, like the Fifth Circuit in *Watkins v. Telsmith, supra*, has be[illegible]penly critical of *Midcontinent* and its progeny, calling the rationale a "classic case of precedential inbreeding where decisions multiply and parrot a holding, with no court pausing, first, to identify the competing social, public, or private interests involved, then, to resolve the possible conflicts, and finally, to give public reasons for the resolution." *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 115 (3rd Cir. 1987). The *Aloe* court specifically criticized *Midcontinent's* reliance-based rationale, observing that it did not address the "competing reliance concerns of the defendant, or the home-spun axioms that a litigant is only entitled to one bite of the apple or to only three strikes at bat." *Id.*, 116. Although *Aloe's* criticism of *Midcontinent* was dicta, the Third Circuit followed *Aloe* and rejected *Midcontinent* in its later holdings: see, e.g., *Lippay v. Christos*, 996 F.2d 1490 (3rd Cir. 1993) (clarifying that in considering a post-trial motion for a new trial, the court was free to consider the abridged record) and *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3rd Cir. 1993) (holding that courts of appeals may not consider inadmissible evidence in reviewing the sufficiency of the evidence on a motion for JMAL, and criticizing *Jackson v. Pleasant Grove* and *Douglass v. Eaton Corp.* for holding contra).[19]

After Marley pointed out in its response to Weisgram's petition for certiorari that *Douglass* was no longer good law in the Sixth Circuit as it had been overruled by *Smelser v. Norfolk Southern Railway Co.*, 105 F.3d 299 (6th Cir. 1997), Weisgram argued in his present brief that *Smelser*, too, is error. But Weisgram failed to inform this Court that his claimed support in the Fifth Circuit from the cases of *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215 (5th Cir. 1983) and *Dixon v. International Harvester Co., supra*, is no longer controlling law in that circuit. These cases were expressly overruled in *Watkins v. Telsmith, Inc.*, 121 F.3d at 991-92.

The Seventh Circuit has not hesitated to grant JMAL for the defendant where plaintiff's expert testimony was merely subjective opinion. *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341 (7th Cir. 1994) (affirming district court's grant of JMAL for defendant manufacturer after excluding expert's testimony because it lacked scientific methodology); *Navarro v. FUJI Heavy Industries, Ltd.*, 117 F.3d 1027 (7th Cir. 1997) (affirming trial court's grant of summary judgment for defendant manufacturer because plaintiff's expert's opinions were not grounded in "an expert study of the problem.")

As the above-cited circuit court cases demonstrate, there is no merit to Weisgram's assertion that the Eighth Circuit's failure to follow *Midcontinent* was reversible error. To the contrary, *Midcontinent's* rationale has been roundly criticized by the Third Circuit and the Fifth Circuit. The Sixth Circuit, which once followed it, has similarly rejected it.

The Eighth Circuit's decision in *Weisgram* clearly reflects the better rule. The circuit courts following *Daubert* have not hesitated to grant JMAL to the defendant in instances where plaintiff's expert proof consists of mere speculation or unscientific opinion. Where, as here, a plaintiff has been fully heard and is still unable to meet his burden of proof with legally sufficient evidence, the appropriate remedy is judgment as a matter of law.

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[19] Weisgram has cited both *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695 (11th Cir. 1993) and *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343 (6th Cir. 1992) in support of his contention that this Court should adopt the *Midcontinent* rationale.

IV. The Eighth Circuit's Decision should be Affirmed on Policy Grounds

The rule that Weisgram has advocated to this Court in its brief — a rule that would require a new trial in every case where a district court or appellate court determines that expert testimony should have been excluded as unreliable — contradicts the authority of federal appellate courts to grant judgment as a matter of law under Rule 50 and under this Court's holding in *Neely*. Such a rule would also surely cause needless confusion within the federal court system. An automatic retrial rule would seriously undermine this Court's holdings in *Daubert, Joiner,* and *Kumho Tire*. District court judges might hesitate to find expert testimony unreliable after the jury has heard it because the result would mean an automatic retrial, even if the plaintiff had failed to carry his burden of proof. Similarly, the appellate courts might hesitate to hold that a district court abused its discretion in admitting expert testimony because the end result would only reward the plaintiff with a new trial, regardless of whether the plaintiff had proved his case with other legally sufficient evidence.

Under the Eighth Circuit's holding in *Weisgram,* on the other hand, a plaintiff in a product liability case would have a strong incentive to proffer reliable experts and to try his best case, knowing that he would surely face summary judgment or JMAL if his expert were unable to pass muster under *Daubert.*

As the Third Circuit aptly noted in *Aloe Coal Co.,* 816 F.2d at 115-16, the courts that simply "parroted" *Midcontinent's* rationale never adequately analyzed the policy considerations that would flow from a rule requiring new trials whenever expert testimony is admitted, then later excluded. And Weisgram did not address them here. Adopting *Midcontinent* in the post-*Daubert* era would cause perverse repercussions and would tend to undo the salutary

effects that *Daubert's* insistence on a reliable basis for expert testimony has wrought.

CONCLUSION

The Eighth Circuit granted judgment as a matter of law to Marley because it rightfully concluded this was the appropriate disposition after determining that State Farm and Weisgram had been fully heard and had presented no legally sufficient evidence in support of the verdict. This decision was based on valid Eighth Circuit precedent, Rule 50, and this Court's time-honored decision in *Neely.*

The Eighth Circuit's decision should be affirmed.

Respectfully submitted.

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October Term, 1999

Chad Weisgram, et al.,

Petitioner,

vs.

Marley Company, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Contrary to the suggestions made in the briefs of respondents and their *amici*, petitioner does not advocate an "automatic retrial" rule. Petitioner does contend that the Eighth Circuit panel majority erred by ordering JAML on a truncated, hypothetical record. The question in this case is what a federal appellate court should do after finding certain testimony inadmissible. Petitioner contends that the better rule is that the case should be remanded to the district court for further proceedings consistent with the evidentiary rulings of the court of appeals. This may, or may not, result in a retrial on some, or all issues.

This better rule comports with the language of Rule 50, the weight of prior precedent interpreting Rule 50, and the constitutional constraints imposed by the Re-Examination Clause of the Seventh Amendment. It obviates the fundamental unfairness of a federal appellate court summarily ordering judgment against the party who has prevailed at all earlier stages of the proceedings, who has relied on the evidentiary rulings of the district court, and who has not had a realistic opportunity to be heard on whether it can cure the defects found by the appellate court. This better rule takes advantage of the fact that in such situations, the district court is in the best position to preside over further proceedings aimed at deciding whether a retrial is appropriate. Further, it serves to promote judicial efficiency.

ARGUMENT

I. THE TEXT AND HISTORY OF THE RULES, AND THE WEIGHT OF EXISTING PRECEDENT, BAR A FEDERAL APPELLATE COURT FROM GRANTING JAML BASED ON A HYPOTHETICAL RECORD

The question on which this Court granted review is not whether an "automatic retrial" is the remedy for any evidentiary error at trial. The question is whether the Eighth Circuit erred in "excising portions of [petitioner's] experts' testimony *before*

ruling on respondents' JAML motion — thereby deciding that motion on a truncated, hypothetical record instead of on the record actually considered by the jury. Pet. i.

One of respondents' *amici* argues that "to look only at the record as it existed at the end of trial, regardless of the actual admissibility of the evidence, artificially confines an appellate court's Rule 50 inquiry." Brief *Amicus Curiae* for Brunswick Corporation in Support of respondents ("Brunswick Br.") at 15-16. This argument ignores the historical origins of Fed. R. Civ. P. 50, the text of the rule, and this Court's unanimous decision in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249, 251 (1940).

In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-87, 395-400 (1913), this Court held that the Re-Examination Clause of the Seventh Amendment bars a federal court from taking a case away from a jury on sufficiency-of-the-evidence grounds except on a motion brought during trial. Motions filed after trial, the Court held, cannot serve as a vehicle for sufficiency analysis. This holding remains good law. Post-verdict JAML motions may constitutionally be entertained only to the extent that a JAML motion is made *before* the verdict, on the *entire* trial record, and the decision of that motion is reserved until after the verdict. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 658-61 (1935). Since *Redman*, the lower federal appellate courts have issued dozens of decisions strictly enforcing this requirement. *See, e.g., Sweeney v. Westvaco Co.*, 926 F.2d 29, 37 (1st Cir.) (Breyer, J.), *cert. denied*, 502 U.S. 899 (1991); *Eastern Natural Gas Corp. v. ALCOA*, 126 F.3d 996, 1000 (7th Cir. 1997), *cert. denied*, 523 U.S. 1118 (1998); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53-54 (2d Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1180 (3d Cir.), *cert. dismissed*, 510 U.S. 1021 (1993); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 n.17 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *See generally* 9A CHARLES ALAN WRIGHT and ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2537, at 343-48, 355-56 (1995).

Rule 50, promulgated by this Court three years after the *Redman* decision, carries out the *Redman* framework. However "artificial" in its operation, the rule explicitly requires that at the post-verdict stage a federal appellate court must limit itself to ruling on the original motion based on the facts as contained in the record at the end of the trial. Rule 50(a)(2) requires that a JAML motion be made "before submission of the case to the jury," specifying both "the law and the facts" under which the movant is entitled to judgment. Rule 50(b) states that if the district court "does not grant" a JAML motion "made at the close of all the evidence," the matter is automatically deemed reserved until after the jury's verdict, and "[t]he movant may *renew* its request" for JAML after trial (emphasis added).

Thus, both the language of Rule 50(b) and the history leading up to it stand in the way of any theory that after making a Rule 50(a) motion based on the actual trial record, a judgment loser may ask a federal appellate court to grant JAML based on a *new* record — a record never considered by the jury — created by deleting certain evidence on the ground that the district court erred in admitting it. Under Rule 50(b), JAML cannot be granted on appeal simply because the appellate court concludes that certain evidence actually heard by the jury should not have been admitted. JAML may not be granted unless the JAML movant demonstrated during the trial, in its Rule 50(a) motion, that it was entitled to judgment based on "the facts" actually contained in the record at the end of the trial.

This Court's decision in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940), issued just two years after promulgation of the Federal Rules of Civil Procedure, confirms this reading with respect to the distinct functions of Rule 50(b) and Rule 59(a) motions. In its first holding in *Montgomery Ward*, this Court stated that post-trial arguments "that the court erred in rulings on evidence" are appropriate on a motion for a new trial under Rule 59(a), but are "not appropriate to be considered in connection with the motion for judgment" under Rule 50(b). *Id.* at 249.

In its second and main holding, this Court further explicated the function of a Rule 50(b) JAML motion — to test the sufficiency of the evidence on the record actually presented to the jury — and its relation to a Rule 59(a) new trial motion. In doing so, it emphasized that "[e]ach motion . . . has its own office." *Id.* at 251. Respondents and their *amici* analyze neither of these holdings in *Montgomery Ward*.[1]

In substance, Rules 50(b) and 59(a) remain the same as they were when this Court decided *Montgomery Ward*, just after the rules were instituted. *Montgomery Ward* sets forth a bright-line rule under which Rule 50(b) JAML motions are decided on the evidence presented at trial, and claims of evidentiary error are decided in connection with Rule 59(a) new trial motions.

For more than half a century following this Court's decision in *Montgomery Ward*, until 1993, this bright-line division between the function of a Rule 50(b) motion (to test the sufficiency of the evidence actually admitted) and the function of a Rule 59(a) motion (to provide a new trial as a remedy for evidentiary errors, and for other reasons) was uniformly enforced in the federal courts. On those rare occasions where district courts confused the motions and made Rule 50(b) determinations not on the actual record at trial but only after deleting evidence that had been erroneously admitted to create a truncated record, the federal courts of appeals always reversed,[2]

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[1] Respondents' *amici* simply assert that this analysis of the rules was *dicta*. Brunswick Br. at 9 n.4; *Amicus Curiae* Brief of the Product Liability Advisory Council, Inc., in Support of Respondents ("PLAC Br.") at 7-8. They are wrong.

[2] *See Midcontinent Broadcasting Co. v. North Cent. Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973); *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343 (6th Cir. 1992); *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993). One of the *amicus* briefs filed in support of respondents cites three cases predating *Midcontinent Broadcasting* that assertedly illustrate an approach contrary to that set out in *Montgomery Ward*. Brunswick Br. at 7-8. All three

in line with the analysis of the rules set out by leading authorities on federal practice.[3]

Since 1993, there have been only three federal appellate decisions (including the decision below) analyzing even briefly this Rule 50(b) issue and holding that JAML motions may be decided on truncated, hypothetical records.[4] By contrast, in the past two years, two more circuits have adopted the traditional bright-line rule that bars deciding JAML motions on a hypothetical record. *Kinser v. Gehl Co.*, 184 F.3d 1259, 1267 (10th Cir. 1999); *Elbert v. Howmedica, Inc.*, 143 F.3d 1208, 1209 (9th Cir. 1998) (en banc); *Schudel v. General Elec. Co.*, 120 F.3d 991, 995-96 (9th Cir. 1997).

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cases upheld a Rule 50(b) grant of judgment notwithstanding the verdict based on a finding, on the *entire* record considered by the jury (without deleting any evidence), that the evidence was insufficient to prove the fact(s) at issue. They are entirely consistent with the *Montgomery Ward* analysis.

[3] *See* 21 CHARLES ALAN WRIGHT and KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5041, at 229-30 (1977) (although a claim of evidentiary error at trial may "be the basis of a motion for a new trial," a federal judge "cannot grant a directed verdict or judgment notwithstanding the verdict by ignoring evidence he has admitted on the ground that the admission was error."); *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 95, at 676-77 & n.3, 682-83 (5th ed. 1994) ("Wright").

[4] The other decisions, both from the Third Circuit, are *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1198-1200 (3d Cir. 1993), and *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993). Two additional decisions issued by the federal circuit courts of appeal since 1993 have allowed the grant of JAML based on artificially truncated records. But these did so without *any* analysis of the Rule 50(b) issue, or even an indication that such an issue exists (the parties apparently not having briefed the issue). *See Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) (departing from prior circuit precedent without analysis); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 306 (6th Cir.) (departing from prior circuit precedent without analysis), *cert. denied*, 522 U.S. 817 (1997).

Thus, the text of Rule 50, its history, its contemporaneous interpretation by this Court in *Montgomery Ward*, and the overwhelming weight of authority in the lower federal appellate courts since then, all rebut the argument of respondents and their *amici* that the federal appellate courts enjoy a power under Rule 50(b) to grant JAML motions, without a remand, based on an analysis of a truncated, artificial, hypothetical record never considered by the jury.

II. THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT REQUIRES RESOLVING ANY DOUBT AGAINST THE NOVEL MODE OF APPELLATE REVIEW EMPLOYED BY THE EIGHTH CIRCUIT BELOW

Even if the language of the relevant rules could somehow be read to permit federal appellate courts to delete certain record evidence before making JAML determinations, the "hypothetical record" theory advanced by respondents and their *amici* cannot be squared with the Re-Examination Clause of the Seventh Amendment, as most recently explained by this Court in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). Except for the PLAC *amicus* brief, respondents and their *amici* ignore both the Seventh Amendment and *Gasperini*.[5]

PLAC's Seventh Amendment argument is premised on an unduly narrow view of this Court's *Gasperini* decision. PLAC suggests that *Gasperini* involved only the issue of "the Seventh Amendment's bearing on the allocation of authority as between trial courts and appellate courts to review verdicts." PLAC Br. at 27. In fact, *Gasperini* involved the broad, long-accepted

[5] PLAC devotes several pages to its view that petitioner is arguing that the Eighth Circuit violated the Seventh Amendment "in excluding the testimony" of petitioner's experts. PLAC Br. at 21; *see also id.* at 20-24. This is not our argument (we recognize that this Court did not grant review of the admissibility issue presented in the petition) so we do not address these pages of PLAC's brief.

principle that the Re-Examination Clause of the Seventh Amendment bars the use of any mode of federal appellate judicial review of jury verdicts that was not used at English common law circa 1791.

The Re-Examination Clause states that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." It is a "substantial and independent clause" that this Court has indicated is, if anything, "more important" than the preceding portion of the amendment, as it imposes "a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner" than through the "modes known to the common law." *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 447-48 (1830)(Story, J.); s*ee also Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

In *Gasperini*, the Members of this Court disagreed over two questions: (1) whether the constraints of a New York tort-reform statute governing damages could reasonably be construed as imposing a substantive legal limit on damages that could be applied by the district court, followed by appellate review for "legal" error under an abuse-of-discretion standard; and (2) whether adopting such a framework for review would invariably draw federal appellate courts into the prohibited enterprise of engaging in weight-of-the-evidence second guessing of jury verdicts. But no Member of the Court disputed the conclusion that the Seventh Amendment bars a federal appellate court from engaging in weight-of-the-evidence review, as this mode of appellate review of jury verdicts was unknown to the common law. [6]

[6] See *Gasperini*, 518 U.S. at 434-38 (1996) (opinion of the Court) (viewing New York statute as imposing substantive cap, applicable in district court and therefore reviewable on appeal); *id.* at 442-47 (Stevens, J., dissenting) (viewing New York statute as prescribing "an objective, legal limitation on damages" with the district court's analysis therefore reviewable on appeal as a matter of law); *id.* at 448-50, 460-469 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (viewing any

The Re-Examination Clause of the Seventh Amendment bars any reading of the rules that might permit the "hypothetical record" approach to JAML rulings adopted by the Eighth Circuit below, and found in a handful of other federal appellate decisions issued during the last six years. Plainly, at common law, motions for judgment were decided on the record *actually* considered by the jury. Of course, "[a]t common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved," *Redman*, 295 U.S. at 659, a practice that makes Rule 50(b) compatible with the Seventh Amendment. *See id.* at 657, 660-61; *see also* Wright, *supra* note 3, § 95, at 682-83.

By contrast, respondents and their *amici* have cited not a single case decided at common law prior to 1791 in which any court attempted, after the jury issued its verdict, to artificially truncate the record and rule on a hypothetical record different from what was before the jury. Neither respondents nor their *amici* claim that this approach is anything but a recent innovation that was first attempted in the federal courts in the early 1970s and that was first implemented in the early 1990s. This approach therefore violates the plain language of the Re-Examination Clause of the Seventh Amendment. And its use in this case, by a federal *appellate* court, violates the well-recognized, core purpose of the clause: to strictly confine the power of appellate courts over jury factfinding. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-32, at 616, 623-25 (3d ed. 2000).

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appellate application of the New York statute as requiring weight-of-the-evidence review that is prohibited by the Seventh Amendment).

III. PETITIONER SHOULD HAVE THE OPPORTUNITY TO ARGUE TO THE DISTRICT COURT THAT THE RECORD VOID CREATED BY THE EIGHTH CIRCUIT CAN BE FILLED, AND THAT FURTHER TRIAL PROCEEDINGS ARE WARRANTED

A. It is Fundamentally Unfair To Deny the Party That Prevailed Below A Reasonable Opportunity to Argue For A New Trial

The unfairness of respondents' position and the ruling of the Eighth Circuit panel majority can be demonstrated by a thought experiment that reverses the position of the parties below. Suppose that, over plaintiff's objection, the defense had introduced (and the trial court admitted) improper testimony from several proffered defense "experts," and a defense verdict on liability had been rendered by the North Dakota jury. If, following unsuccessful post-trial motions, plaintiff succeeded in convincing the appellate court to excise certain defense expert testimony, could the appellate court then simply direct entry of judgment for the plaintiff on the issue of liability? One can imagine the protest from the defendant that it had no opportunity to return to the trial court to even suggest that the plaintiff's case was still too weak to result in a verdict, or that the defense should (in the face of the previous defense verdict) at least be given the chance to defeat the plaintiff again before a jury.

No one — let alone the appellate court on a cold record — can tell why a jury decided as it did, let alone what it could properly decide on a different (and proper) record. There is no way of knowing (as the Eighth Circuit panel majority arbitrarily assumed here) that the jury found as it did because of the excised testimony. This is especially true under North Dakota law because, as the Eighth Circuit panel majority omitted to report, common law in that state permits a product defect finding on circumstantial evidence alone. *See, Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472 (N.D. 1976); *Schmidt v. Plains Elec., Inc.*, 281 N.W.2d 794 (N.D. 1979). Expert testimony may

be superfluous or petitioner may be able to find new and proper experts. It is inescapable that the Eighth Circuit panel majority here assumed that petitioner *would* not and *could* not have prevailed without the excised testimony. That assumption is as speculative as it is false. Petitioner was never given the opportunity to demonstrate that point either from the remaining record or by proffers of additional witnesses or other evidence. This is fundamentally unfair. The better rule would at least afford him that opportunity.

Fundamental fairness requires an opportunity to be heard at a time when the litigants are at least aware of the details of the excluded evidence, so that the litigant who relied upon the inclusion of that evidence at trial can thoughtfully describe to the court the implication of the ruling[s] just made. Such arguments and briefing should not be made in a vacuum (that is, before the decision to exclude has been announced), as respondents contend should have occurred here.

Indeed, the only other federal circuit court of appeal that has ever permitted use of the "hypothetical record" theory and has offered any analysis of what it was doing — the Third Circuit, see p. 5 & note 4, *supra* — has indicated that with any use of this theory should come deference to the analysis of district courts on factual points. Thus, in its first decision upholding the use of this approach to JAML motions, in a case where it held that the district court's erroneous admission of hearsay testimony had been prejudicial, the Third Circuit, did not articulate this JAML approach as one to be followed by an *appellate* court after ruling testimony inadmissible on appeal. It stated that it was "reluctant to make the initial determination" of JAML after its exclusion of the hearsay testimony, and it then remanded on its belief "that the district court should have the first opportunity" to assess the JAML motion on the changed record. *Lippay v. Christos*, 996 F.2d 1490, 1501 (3d Cir. 1993) (cited in Respondents' Br. at 28). The *Lippay* court also stated that if the district court denied the motion for JAML, then the proper remedy would be a new trial. *Id.* That approach should be adopted here.

For a federal appellate court to make the new trial decision as part of its rendering of an opinion on the admissibility issue, without further briefing, is for it to make the decision without the benefit of meaningful argument from counsel. Such a procedure violates fundamental fairness and unnecessarily invites error which often could have been easily avoided if the parties had been given an opportunity to provide argument in light of the changed circumstances in the case.

B. Under These Circumstances the District Court is in the Best Position To Determine Whether Further Proceedings Are Warranted

The briefs of the parties in this Court, especially that of the respondents, demonstrate the error of the Eighth Circuit panel majority in attempting to determine whether a new trial should have been awarded. A reading of these briefs makes it clear that the parties have wholly different views of the evidence and the inferences to be drawn from the evidence. Although the factual issues are not before this Court, the respondents' brief does contain numerous misleading characterizations of the evidence presented at trial. To point out the contentiousness of these issues, petitioner will mention only the most egregious misrepresentations of the facts.

First, respondents claim that Bonnie Weisgram died several hours before the fire started in the entryway. Respondents' Br. at 1. The Coroner determined that she died somewhere between 12:30 a.m. and 4:30 a.m. on December 30, 1993. Vol. II, pp. 32-33, 47-48. Captain Freeman testified there were two separate fires in Bonnie Weisgram's home which went through four distinct stages. Freeman, pp. 175-77. The first stage lasted "an hour or two" before it ignited the livingroom couch. *Id.* at 186. The smoldering fire in the couch (stage 2) lasted at least two to three hours before it used up most of the oxygen inside the home. *Id.* at 74-75. Finally, the flaming fire in the entryway (stage 4) lasted an additional hour or two before it was discovered by an off-duty firefighter. *Id.* at 186. Thus, the

evidence showed that the initial entryway fire started at approximately 2:30 a.m., well within the range for Bonnie Weisgram's time of death as set by the coroner.

Second, respondents suggest that Dolence only works as a consultant for plaintiffs' attorneys regarding product-related fires. Respondents' Br. at 3, note 3. Dolence was originally contacted by the Fargo Fire Department, not petitioner, to investigate the cause and origin of the fire. Freeman, pp. 79-81. Moreover, Dolence had previously been retained by respondents themselves, prior to his involvement in this case, to investigate a fire allegedly caused by another Marley product. Dolence, pp. 18-19.

Third, respondents gratuitously describe Bonnie Weisgram's body as "testing positive for a toxic amount of antidepressants". Respondents' Br. at 1. In truth, petitioner presented expert testimony of a toxicologist at trial who explained to the jury that the toxicology finding was of no medical significance. Vol. IV, pp. 35-37. For many years, Bonnie Weisgram, a music teacher for the Fargo Public School system, had been properly prescribed and was taking a prescription drug, amitriptyline, for a painful muscle condition. Vol. IV, p. 33. It also operated as a sleeping aid. Vol. IV, pp. 25-32. Significantly, the toxicologist described that, postmortem, this medication is known to "redistribute" from muscle tissue to the blood stream, leading to the appearance of higher than normal levels at autopsy. Vol. IV, pp. 35-37. Respondents never challenged the toxicologist's explanation, and the jury obviously concluded that the medication played no part in this fire.

Much, if not most, of the brief of the respondents is devoted to attempting to establish to this Court that there was insufficient evidence to go to the jury, once the Eighth Circuit panel majority had determined that certain of the expert testimony proffered by petitioner should have been excluded. The difficulty with this approach is that it essentially requires this Court, as it required the court of appeals, to review what all of the evidence indicates and then determine whether a reasonable

juror could have found both that the fire was caused by the heater manufactured by respondents and that the heater was defective. At the very least, it should be apparent, since the evidence that was improperly admitted (according to the Eighth Circuit panel majority) related only to the issue of defect, that the question of whether the jury properly found the heater was the cause of the fire, whether defective or not, does not remain as a substantial issue in the case.

While respondents labor mightily to show there was insufficient evidence of defect, it is a labor neither this Court nor the court of appeals should undertake in the first instance since both courts have, at best, a paper record before them with an incomplete sense of what the jury saw and heard, and no sense of the pretrial proceedings. For this reason alone, the decision to order JAML and not remand to the district court for further proceedings was error.

But petitioner need not rest on that proposition alone. This case does not simply involve the question of whether the trial record presented by the prevailing party to the jury was sufficient as a matter of law. In this case, there is another question that must be addressed, and on this question the court of appeals is simply in no position to make an educated or even an uneducated guess. That question is whether, under all the circumstances, petitioner should be entitled to present additional evidence at a second trial that he was not able to offer, or chose not to present at the first trial, because of the favorable rulings of the trial court in admitting evidence which was subsequently excluded by the court of appeals. Because the court of appeals had no involvement whatsoever with pretrial matters, nor has petitioner ever been given a realistic opportunity to make a proffer of additional evidence that it would now offer in light of the rulings of the court of appeals, the question of whether a new trial will occur will not simply be based on what occurred at the first trial, but upon what might take place at a subsequent trial. On that issue, the court of appeals is completely without guidance since it had no way of knowing what evidence was not

presented, nor what could be presented at a subsequent trial since the record before it is completely silent on both points.

The trial court knows state law. The trial court understands its calendar and schedule. The trial court saw and heard all the evidence and testimony. The trial court is uniquely positioned to determine whether enough substantive evidence remains, or can reasonably be produced, to proceed to trial, and on what issues. At a hearing in the district court, a thorough record can be made. A new *Daubert* hearing may be in order. All litigants could research and assess the implications of the excluded testimony, and then a thoughtful decision could be made capable of appellate review. No such arguments were made. No such thoughtful review was made. We have no such record here.

IV. PETITIONER'S ONLY REALISTIC OPPORTUNITY TO PRESENT HIS ARGUMENT FOR A NEW TRIAL IS IN PROCEEDINGS BEFORE THE DISTRICT COURT AFTER THE APPELLATE COURT RULING

Respondents and especially their *amici* attempt to downplay the harshness of allowing the court of appeals to end the case without even affording the verdict winner below an opportunity to argue for another trial, by suggesting that petitioner had three such opportunities and failed to take advantage of any of them by presenting persuasive evidence to support a new trial. Under this theory, the first opportunity was when respondents moved for JAML in the district court, the second opportunity was on appeal when the argument could have been included in petitioner's brief as the appellee, and the third opportunity was as part of the petition for rehearing. None of those opportunities would afford a meaningful procedure by which the issue of a second trial under the circumstances of this type of appellate reversal should be decided.

It is vital to recall that there are many reasons in any given case why a court of appeals might reverse a jury verdict, and the reversal in this case deals with only one limited category: when the trial court admits evidence offered by a party, who then

obtains a favorable jury verdict, which is overturned on the ground that the evidence should not have been admitted. The problem of what to do in this precise situation arises out of the fact that the appellate court is being asked to decide a question never presented to the district court because that court admitted the now excluded evidence. To answer that question, it is necessary to determine what other options the verdict winner had and either chose not to exercise (in order to limit the trial to its essentials) or did not consider because of the prior rulings of the trial judge. Moreover, to answer those questions, it is necessary to know not just what objections the verdict loser was making, but which ones the appellate court would accept and, most significantly, on what rationale. Until that information is known, the verdict winner is in no position to make a proffer as to what a new trial would look like and how it would not run afoul of the ruling of the appellate court.

It is principally because the appellate court will not yet have ruled that the first two "opportunities" are simply not viable in this situation. A litigant has no way to anticipate each detail of an appellate court's rulings with sufficient clairvoyance to pre-brief and argue the implications of those rulings before they are announced. In addition, respondents would effectively require the verdict winner to argue against itself, by both defending the rulings being challenged and then asking for the mercy of a new trial if those arguments are rejected. No advocate should be placed in that position. Indeed, Rule 50(c)(2) of the Federal Rules recognizes that inherent dilemma and allows a motion for a new trial by the verdict winner to be made up to 10 days *after* a trial judge decides to grant JAML.

The third "opportunity" is not any more realistic, but for different reasons. Surely the verdict winner will no longer have to argue against its own interests, and counsel will know why the verdict was set aside and hence what the grounds rules are for any new trial. The problem is that the court of appeals will almost certainly lack the information about what transpired in the district court, such as whether other witnesses were available but not called (as in this case) and if not why not, and what

alternatives the verdict winner had to prove its case, such as use of circumstantial or other direct evidence that was not introduced in light of the rulings of the trial judge admitting the now-excluded evidence. Some of this information may be in the record of the district court, but may not be part of the record on appeal because it did not bear on the issues on which the appeal focused. Other parts may be in the court reporter's notes that no one asked to be transcribed, and others may never have been recorded anywhere, or even communicated to the trial court. Furthermore, all of that information would have to be considered in light of the ruling of the court of appeals, which could not be done until after the decision is rendered.

In addition to the evidence that was available, but not needed in the first trial, another significant way in which a verdict winner will be able to proceed to trial again and to prevail at one is by presenting more detailed qualifications from the excluded expert and/or having the excluded expert perform additional testing to satisfy the concerns of the appellate court. Yet another way to prevail at a second trial is by obtaining new evidence – in this case in the form of new experts – who will meet the objections of the court of appeals. According to respondents and their *amici*, this information should have been set forth in the petition for rehearing that must be filed within 14 days of the decision of the appellate court. Assuming that a verdict winner can meet what in most cases will be a nearly impossible schedule, absent a lengthy extension, that is simply the beginning of the process. Surely, the successful appellant will not just accept new expert testimony on its face, but will insist on taking discovery of the expert and demanding a *Daubert* hearing. The verdict winner could not reasonably oppose such requests, and no court should decide on a new trial in these circumstances without hearing both sides.

The fallacy in respondents' argument is its suggestion that the court of appeals is the place where those proceedings should take place. To the contrary, both because the district court may have some of the needed information from the prior proceedings (and/or can get it easily), and because issues relating to

discovery and admissibility of expert testimony are the province of the trial court in the first instance, it simply makes no sense to force proceedings of this kind into a rehearing process in the court of appeals, when that court is in no position to make the kind of nuanced judgment about whether a new trial should be granted that the trial court can and should do. In the process of deciding whether further proceedings are warranted in the interests of justice, the trial judge is in the best position to weigh the competing equities, including the reliance interests of both sides. Moreover, because the trial judge will have to sit through any retrial, the trial judge will certainly not bend over backwards to have a new trial unless he or she is convinced that there is a reasonable likelihood that a new trial will produce a verdict that is capable of being sustained on appeal. Therefore, contrary to the contentions of respondents and their *amici*, petitioner has not had a realistic opportunity to present reasons why further proceedings are warranted.

V. THE EFFICIENCY ARGUMENT ADVANCED BY RESPONDENTS AND THEIR *AMICI* IS MISTAKEN

Respondents and their *amici* also urge that allowing appellate courts to order JAML on an artificial, truncated record, as did the Eighth Circuit below, promotes efficiency. Brunswick Br. at 26-27, 29-30; PLAC Br. at 17; Respondents' Br. at 30. But the suggested efficiency gains of abandoning the traditional approach to JAML practice are illusory. The traditional rule does *not* mandate "automatic retrial." If the evidence that was presented at trial, after deletion of the improperly admitted evidence, is insufficient to create a factual issue for trial, and if the plaintiff does not produce in compliance with the rules other evidence to fill the gap, then the defendant need only file a summary judgment motion to end the case. No rewriting of Rule 50(b) is needed to avoid pointless and wasteful "automatic retrials."

Easily offsetting any efficiency gains in the relatively few cases at the *top* of the federal litigation pyramid that might be

terminated slightly sooner under the "hypothetical record" approach are the enormous efficiency losses that would occur at the *bottom* of the pyramid. As noted in our opening brief, and as no one denies, if federal appellate courts are permitted to delete evidence from the trial record before deciding Rule 50(b) JAML motions, "parties will be forced to 'over try' their cases" out of a concern that some evidence might later be deleted on appeal. Pet. Br. at 25. For example, "[p]arties will be forced to present more than one expert on each issue because the appellate court might 'second guess' the expert's qualifications or opinions." *Id.*

Far from denying this point, respondents and their *amici* agree that under the "hypothetical record" theory they propose, litigants must put on at trial *all* the evidence they can possibly muster, or else risk "sudden death" on appeal if they put on sufficient evidence to win, but some of it turns out to be inadmissible. Focusing solely on the efficiencies involved in this case, they argue that at trial petitioner had an obligation to put on every piece of evidence available to him, even if the evidence would duplicate evidence already admitted that was sufficient to prove the case — a rule that, concededly, would serve to ensure that *this case* need only be tried once, as efficiently as possible. *See* Brunswick Br. at 23 (complaining that "petitioner *voluntarily* chose not to put on one of the experts disclosed in the pretrial order"); *id.* at 30 (litigants should "present their best evidence"); Respondents' Br. at 30 (a plaintiff should "try his best case").

But the issue with respect to an efficiency analysis is not whether a "hypothetical record" approach is justified to ensure that this case, or the handful of other like cases on appeal, will come to an end as quickly as possible. The issue is whether the resource savings on these few cases would be outweighed by the costs that would be imposed on litigants in *all* cases who will in the future collect evidence, conduct discovery, and produce witnesses for trial. If the approach of respondents and their *amici* is adopted, all future litigants will find it necessary to overprepare and overtry their cases simply to avoid the risk of

what will quickly become known as a "*Weisgram* reversal" — that is, a post-verdict loss caused by the failure to put on enough duplicative evidence to cover gaps not in the *actual* trial record, but in the truncated, *hypothetical* trial record to be created after the jury's verdict and before the decision on the JAML motion.

Most of these costs will be incurred across a broad range of cases at the base of the litigation pyramid, as cases are prepared for trial. Only a tiny fraction of civil cases are ever tried, and only a tiny fraction of cases that are tried and appealed would qualify on their facts for *Weisgram* reversals. Thus, it is readily apparent that the minor efficiencies that would be gained from each *Weisgram* reversal would come at the price of substantial inefficiencies imposed on litigants in hundreds of cases being prepared for trial.

This Court confronted a strikingly analogous situation several years ago, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 28 (1994), where it dismissed an efficiency argument similar to respondents' as "impossible to assess." In *Bonner Mall*, the Court rejected the view that had been taken in some circuits that federal courts should order routine vacatur of their decisions where the parties in a case pending on appeal desire to settle, but have conditioned their settlement on vacatur of the underlying decision. In a unanimous opinion for the Court, Justice Scalia noted that "while the availability of vacatur may facilitate settlement" on appeal in *the particular case at hand*, a rule allowing routine vacatur "may deter settlement at an earlier stage," as some litigants in the beginning stages of a case "may think it worthwhile to role the dice rather than settle . . . if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur. And the judicial economies achieved by settlement at the district-court level are ordinarily much more extensive than those achieved by settlement on appeal." *Id.* at 27-28.

We urge the Court in this case to carefully consider the enormous systemic costs that would likely be imposed at the district-court level, with regard to both trial preparation and

trials, if the appellate court rule advocated by respondents and their *amici* is adopted.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-161

In the
Supreme Court of the United States
October Term, 1999

Chad Weisgram, et al.

Petitioner,

vs.

Marley Company, et al.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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Introduction

Respondent Marley respectfully submits this supplemental brief pursuant to Supreme Court Rule 25(5) to bring to the attention of the Court new matter that was not available in time to be included in respondent's brief on the merits. The purpose of this supplemental brief is to inform this Court of certain concessions and statements made by counsel for the plaintiffs during the oral argument in the Eighth Circuit Court of Appeals. These concessions and statements are directly contradictory to statements in petitioner's brief on the merits.

Transcript of Oral Argument was not Previously Available

After receiving petitioner's brief on the merits, counsel for respondent attempted to obtain a transcript of the petitioner's oral argument in the Eighth Circuit Court of Appeals. The appellate clerk advised that no transcript was available, but that the argument had been recorded on audiotape. Marley counsel requested a duplicate of the audiotape, but the first tape received was not audible. At counsel's request, the clerk duplicated the tape again and sent another copy. The second tape was, again, partially inaudible. Marley counsel sought help from the court reporter for the United States District Court for the District of North Dakota, Southwestern Division, in Bismarck. The reporter worked with the tape on his equipment and was able to transcribe petitioner's argument. Marley counsel received the transcript from the court reporter on Monday, December 13, 1999, after respondent's brief had been filed. The full text of the argument is in the appendix to this brief.

Statements in Petitioner's Brief on the Merits

Petitioner's brief contains the following assertions in his Statement of the Case at page 12:

1. "The petitioner maintained at trial that the Weisgram heater contained *several serious design defects* which were noticed after the fire and which combined to cause the fatal fire." (emphasis added)
2. *High-limit - "One design defect* was in a safety feature: the placement of the high-limit control capillary tube within the heater enclosure . . ." *Id.* (emphasis added)
3. *Thermostat* - "There were two defects involving the regulating thermostat; first, the movable arm contact in the regulating thermostat contained unusual serrations from the manufacturing process which limited the contact area for electricity; and second, the contacts themselves 'mated' only partially, or in one quadrant of their contact area. These *design defects* promoted arcing and material transfer." *Id.* (emphasis added)

Statements in Petitioner's Oral Argument in the Court of Appeals

During the oral argument in the Eighth Circuit, the panel questioned the plaintiffs' attorney about his theory of product defect and the basis for it. Counsel made the following concessions and statements:

1. "Lazarowicz never talked about a design problem in this case." *Tr. of o. arg.* at 4 (A-4)
2. "We never claimed that the high-limit control was defective." *Id.* at 5 (A- 4-5)

3. "We never said that the high-limit control failed." *Id.* at 13 (A-10)
4. "We're not claiming that there was a design problem in the case." *Id.* at 19 (A-14)
5. "We're not claiming that there was necessarily a design defect for all these heaters." *Id.*

The Eighth Circuit panel majority recognized the inconsistencies in counsel's position and noted the contradictions inherent in plaintiffs' theories of liability in its opinion at footnotes seven and eight:

> *note 7:*
> At oral argument, counsel for plaintiffs said the high limit control was not defective and did not fail, but simply did not shut off the heater when it should have. It is not clear to us, then, what the plaintiffs' theory of liability now is. We continue with our analysis, however, under the theory submitted to the jury: strict products liability because of a design or manufacturing defect.
>
> *note 8:*
> Dolence testified that the heater was *not* defectively designed, but that it may have had a manufacturing defect that he simply could not identify. Lazarowicz testified that the defects *were* in the design of the heater the serrated contacts on the thermostat and the placement of the high limit control sensor but he also said there was *no* design defect in the high limit control. These contradictions from the plaintiffs' own witnesses are yet another indication that the jury reached a finding that the heater was defective only by engaging in speculation. (emphasis in original)
>
> *Weisgram v. Marley Co.*, 169 F.3d 514, 521-22 (8th Cir. 1999).

Conclusion

Petitioner's statements to this Court in his present brief at page 12 that the heater had "several serious design defects" cannot be reconciled with counsel's concessions to the court of appeals during oral argument.

Respectfully submitted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Chad Weisgram, individually and on behalf of the heirs of Bonnie Jo Weisgram, decedent,	)	
Appellee,	)	
vs.	)	No. 97-3735
Marley Company, a Delaware Corporation and its subsidiary, Marley Electric Heating Company, a Delaware Corporation; United Dominion Industries, Inc., a Delaware Corporation,	)	
Appellants.	)	

TRANSCRIPT OF ORAL ARGUMENT

BY MR. DUNN

Taken At
United States Courthouse
Fargo, North Dakota
November 16, 1998

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(The following proceedings were transcribed from an audiotape recording made at the time and place hereinbefore indicated:)

JUDGE BRIGHT: Mr. Dunn.

MR. DUNN: Thank you, Your Honor.

May it please the Court. Counsel.

At the trial of this case, the parties presented two separate and distinct theories or reasons for why this fire happened. I don't have to spend a lot of time explaining their rational for what happened. That's not the point here. The point here is that the jury adopted the plaintiff's theory of what happened. This Court must accept that.

JUDGE BRIGHT: Well, we don't have to accept it if it's based on witnesses whose testimony cannot be deemed reliable, whether it's under the test of -- the Daubert test or other law. And what your point is saying essentially is, particularly the metallurgist, his testimony just didn't stand up in light of the examination and testing of the component parts after the accident -- the fire. Now what do you say to that?

MR. DUNN: You bet. There are two points I would like to make, Your Honor. Number one, the heater was destroyed by this fire. That heater didn't work afterwards. The component parts -- the plastic that held the component parts together -- were burned in the fire. What we found after the fire, we found the contacts, we found the spring arm, but they weren't together. There was no way to test the regulating thermostat -- and that's the thermostat that turns the heater on and off -- and the pilot controls to determine whether those things actually worked.

What we were forced to do is look at the component parts -- the physical evidence -- through a stereoscopic microscope, an electron microscope, and see what those

physical contacts told us. That's why Lazarowicz is in this case. Dolence didn't have access to these. Freeman didn't have it. Lazarowicz is a metallurgist. These contacts are made of silver. Obviously, a metallurgist can talk about the properties of silver. We never -- and part of the frustration in this case is that the parties seem to be talking past each other. Lazarowicz never talked about a design problem in this case. This case was about trying to figure out why that heater started on fire. We don't care about the other heaters that are out there. We don't care about the design problem. We want to figure out why this one started on fire. That's why Lazarowicz testified. And what he testified -- you bet.

JUDGE MAGILL: On Lazarowicz's testimony, you say he never testified about the design situation.

MR. DUNN: Correct, Your Honor.

JUDGE MAGILL: I refer to page 33 of the red brief. Do you join in that brief?

MR. DUNN: I do, Your Honor.

JUDGE MAGILL: Would you get the red brief? The high limit --

MR. DUNN: Excuse me?

JUDGE MAGILL: The high limit is not there.

MR. DUNN: Correct, Your Honor.

JUDGE MAGILL: The problem was the placement of the high limit control within the heater enclosure.

MR. DUNN: Correct, Your Honor.

JUDGE MAGILL: And it's behind the deflector shield at the top of the heater. The high limit control did not sense -- it didn't measure for high temperature in and around the heater until it was too late. That is not testimony on design?

MR. DUNN: That is an explanation for why the high limit control did not work in this case. We never claimed that

the high limit control was defective. What we were saying is that it did not work in time. In other words --

JUDGE MAGILL: What you say in the brief. You say it was misplaced by design during manufacture.

MR. DUNN: And I guess I don't read it to be that way, Your Honor. I would read it to be an explanation of why the high limit control did not work as it was intended to at the time of the fire, because what happened here, what we are alleging, is that the regulating thermostat -- that's the thermostat that turns the heater on and off -- the contacts, the silver contacts -- were welded or stuck together. That means that this heater is generating heat. As this heater generates heat, and so those contacts separate. And this heater is what is known as a five hundred block heater. This heater can reach temperatures that if they're outside of the heater -- in other words, the air coming out of it can be in excess of 575 degrees. The heat that is around the aluminum tube which serves as the boiler for the heating element reaches temperatures in excess of 770 degrees. Those are temperatures that are clearly in excess of combustibles that is in and around the electric import here. Specifically, the rug.

JUDGE BRIGHT: I noticed the rug was there. I mean that's an important thing, because otherwise it's speculation, and I want to know why it wasn't the pillow, rather than the rug.

MR. DUNN: Two reasons, Your Honor. Number one, there was testimony from three separate witnesses that when the door was opened -- that front entryway door -- the rug had been pushed up behind the door and onto or near the electric baseboard heater. That's one thing.

The second thing is that hole that we heard about. There was material around the hole that Captain Splitt, another fire investigator from the Fargo Fire Department, took samples of.

He saw material around the hole. He wanted to see whether there were accelerants. He wanted to see what type of material that was. He took samples from around the hole. What he found, unmistakably, was a jute polypropylene rug. That puts that rug right over that hole, and that hole is right underneath the heater. And the reason why Captain Freeman never found the rug after the fire was because most of the rug burned in the fire.

JUDGE BRIGHT: Well, let me ask you a question here. The fact that it may have started in the heater doesn't establish your case. You have to show that this heater was defective, first, and you can't show the heater was defective merely because there was a rug laid over it. What was the defect in the heater? I'm still trying to figure that out.

MR. DUNN: The defect in the heater, Your Honor, was the fact that the regulating thermostat's contacts welded. This heater started up --

JUDGE BRIGHT: Well, when you say "welded," you mean they welded without heat?

MR. DUNN: Yes, Your Honor. That's the way it started. These contacts usually come together and turn the heater on. What happened is these contacts welded together. There was actually material --

JUDGE BRIGHT: Before the fire or after the fire?

MR. DUNN: Before the fire, Your Honor. That's what caused the fire.

JUDGE BRIGHT: And they were open after the fire.

MR. DUNN: They were open after the fire; that is correct. And here's the reason why: The contacts came together and this heater started to heat. The rug is over the heater. The rug blocks the heat from dissipating. This is a convection heater. The heat rises. But now it's being knocked back down into the heater. The petroleum-based glue acts as

an accelerant beneath the linoleum -- the linoleum, and it's going to the subfloor. That heats up. We've got temperatures inside the heater in excess of 775 degrees.

JUDGE BRIGHT: Well, then the contacts welded together because they were serrated? Is that your theory?

MR. DUNN: That is one of the issues, Your Honor. There are basically three issues when it comes to the regulating thermostat. Number one is serrations. "Serrations" simply mean the grooves in the contacts. Basically, what it is is mountains and valleys. There are eight of them. That does not provide for a good mating surface because you've got distance between the two contacts. It promotes particles. It promotes what is called material transfer. What I mean by that, in Dr. Lazarowicz's testimony that they supplied -- that was Exhibit 45 and 53 -- clearly show there was material -- silver -- on this contact, that was transferred to this contact. It had literally pulled material away from that, and the reason why the contact was found separated was because, when the fire got going, obviously it raised all of the temperature in that area; the contacts got to this point of about 850 degrees, which allowed them to become softer and molten, and that's why they split apart. That's why they were separated at the time that they were found.

JUDGE BRIGHT: Well, tell me very simply what your theory of liability is; not where the fire started. What's the theory of liability?

MR. DUNN: The theory of liability, Your Honor, is that these contacts welded and started the fire, and that fire spread through --

JUDGE BRIGHT: Well, what was the defect in the contacts? That they were serrated?

MR. DUNN: That is one of the issues. The serration is --

JUDGE BRIGHT: Tell me where your right to collect is against the Marley heater.

MR. DUNN: There was a defect in the regulating thermostat at the time. Number one is serrations. Number two, there was a spring arm that allowed the contacts to spring open and close. There was also -- it also involves the plastic cover on the housing in that area. We claim, Your Honor, that that regulating thermostat was defective because of the serrations, because of the way it mated. It did not mate properly. It only mated in one part of the contact, and that allowed -- I'm sorry, Your Honor -- that allowed only a small surface of the contact to actually funnel the electricity. It's similar to if you have a large hose and you've got water running through it. You might have just a trickle of water running through it. But if you have a small hose with the same amount of water, the same pressure, all of that is directed to one small area.

JUDGE BRIGHT: Doesn't it really come down to this: That you're saying that if this fire started in the heater, the heater had to be defective? If it started in the heater, the heater was said not to -- not to -- not to have started the fire, and if it -- the fire started there, that's all you have to prove?

MR. DUNN: This is a product liability case, Your Honor. It's a strict product liability case. If we prove that this product did not work as it was intended or designed, that is the course of liability.

JUDGE MAGILL: I thought your expert originally in his deposition testified with respect to serrations; that after he was shown an exemplar heater, that it was perfectly normal that it had serrations in it, he backed off that theory.

MR. DUNN: Your Honor, that's my fault. And here's why: As part of this case, really, everyone wanted to look at the Ferguson contacts -- that's the exemplar contacts -- at the

same time. So the parties gathered in Chicago and were to take a look at these furnace exemplar contacts at the same time. Mr. Lazarowicz had seen the Weisgram contacts. He obviously had not seen the Ferguson contacts. He was shown them, and then, literally 30 minutes later, he was asked to testify about the differences and similarities in between the Weisgram contacts and the Ferguson contacts. I put him in a bad spot. That wasn't fair.

What Mr. Lazarowicz wanted to do was examine those contacts under the same circumstances, with an electron and stereoscopic microscope, to compare them, to do a fair analysis. He was not able to do it with literally 15 people standing around him and then being pestered about his opinions. And that was the reason why there seemed to be some inconsistencies in Mr. Lazarowicz's -- his opinion, because he just wasn't given the same opportunity to review the Ferguson contacts as he was the Weisgram contacts. And that's my fault. And we fixed it with a supplemental report.

JUDGE MAGILL: One further question --

MR. DUNN: You bet. Sure.

JUDGE MAGILL: In our Scheels Hardware & Sports case, it is critical in a product liability case that there must be a defect which existed when the product left the manufacturer, and -- so what is the defect 15 years earlier when this product was manufactured?

JUDGE MAGILL: Here is the defect, Your Honor. We've got a heater --

JUDGE MAGILL: I take it it worked perfectly well for 15 years.

MR. DUNN: Absolutely, Your Honor.

JUDGE MAGILL: For 15 North Dakota winters.

MR. DUNN: No question about that. The defect exists in that -- in all this case, it all comes down to that regulating

thermostat, the regulating contacts. With these serrations, coupled with the spring tension in that spring arm, coupled with the fact that these surfaces were not mating properly, it made it very likely that when this heater turned on and off and on and off and on and off, there would be a time when those contacts could not separate. This was simply -- from our perspective, this was simply a matter of time. As soon as this particular heater had cycled a certain number of times --

JUDGE BOWMAN: Which one of your experts testified and gave an opinion that this is the reason they either failed --

MR. DUNN: That would be Mr. Lazarowicz, Your Honor. He talked about the cycling of this particular heater, and the fact that, again, it goes back to its a combination of the serrations, the spring arm mechanism, the non -- the nonmating surfaces.

JUDGE MAGILL: But he said there were two temperature controls.

MR. DUNN: Right.

JUDGE MAGILL: There was the high-level control and then there was a thermostat.

MR. DUNN: Correct.

JUDGE MAGILL: He said that either one of them would have shut the heater off.

MR. DUNN: Correct.

JUDGE MAGILL: He also testified that the high limit control was not defective.

MR. DUNN: That's correct, Your Honor. We never said -- and, again, this goes to the fact that the parties seem to be talking about each other. We never said that the high limit control failed. What it did is it worked too late.

And here is why we say that. This particular high limit control is designed to shut off the heater when temperatures in and around the heater reach 190 degrees. The testing that was

done by Dr. Ogle in this case was spectacular for us. It was a real bonus, because when he did his testing, he found in a normally operated heater, that it would reach temperatures of in excess of 450 degrees from where it would shut off. If it would shut off at 190, as it was designed to do, it should have shut the heater off at roughly 200 degrees. But it was reaching temperatures in excess of 400 and 450 degrees before it shut the heater off, and that led us to believe that, again, the high limit control did not fail; it simply worked too late after the fire started.

Another thing that the clerk brought up earlier, and this goes to Marley Company's explanation of that hole in the floor and (inaudible) at the same time. Here was (inaudible) the same situation.

It fails because of two particular reasons. Number one, Dan Freeman was in that house on December 30th, 1993, literally 15 minutes after that fire was put out. Dan Freeman saw that cushion, that middle cushion on that couch. That's the same cushion that Dr. Ogle said had been taken off of the couch and moved not outside, not put somewhere else, but literally behind the front door, on top of the heater. That's the only way that you could put a hole in that floor, is that polyurethane couch --

JUDGE BOWMAN: But here's something I don't understand. The couch was pretty much all burned up. There had to be (inaudible), whether there was another cushion there or not.

MR. DUNN: The photographs are somewhat difficult to look at and figure out because of the angles; but Captain Freeman actively looked whether this was a careless cigarette fire. He looked for indications of that. In other words, he looked at the couch, and --

JUDGE BOWMAN: But it was all burned up. So what did he know from that?

MR. DUNN: And, Your Honor, perhaps looking at the photographs, you might come to that conclusion; but Dan Freeman knew that that couch cushion was there because he checked for it at the time.

JUDGE BOWMAN: There might have been a photograph showing the position.

MR. DUNN: Well, again, that's a different interpretation. Obviously, we think that the couch cushion is there as shown in the photographs. They disagree with us. I'm not sure if the Court does. But the only eyewitness there that can actually testify whether that couch cushion was there saw it and said it was.

And the second thing that's important about Dr. Ogle's opinion is that there was no evidence whatsoever of polyurethane foam, which is the material in the couch cushion, in that entryway. Remember Captain Splitt. He's the guy that took samples around that hole. He didn't find any polyurethane foam. He was looking for it. He would see it. It's a very distinctive charring. You'd know it if it was there. I asked Captain Splitt that. "Did you see any of that?" "Absolutely not." I asked Freeman: "Did you see any foam there?" "Absolutely not." We asked every witness. We took a lower cause -- this is a hole in a five-inch plank of wood. This shows that that fire was burning very hot and very long in that spot. We looked beneath the hole. There was a closet beneath the hole. "Was there any evidence of polyurethane foam beneath the hole?" The testimony was "no." You have to throw out the careless cigarette theory because it just doesn't stand up.

But in terms of the -- the real testimony that's important, I think, is the Daubert analysis, and that is two things; number

one, the relevancy of these people's opinion as experts; number two, their reliability. They never questioned the relevancy. Nobody disputes that this testimony of these experts were relevant to this case. They challenged the reliability.

JUDGE BOWMAN: When you say "expert," was Captain Freeman an expert?

MR. DUNN: I don't know whether Captain Freeman was an expert, Your Honor. He was a fact witness. He testified about his observations. But keep in mind that this man's job was to figure out why that fire started. His testimony necessarily involved his opinion in explaining how he determined it wasn't a fire in the couch and it was in that baseboard heater. And it also --

JUDGE BOWMAN: What was his theory, then, of how the fire got from the heater up to the couch?

MR. DUNN: The heater -- as you walk into that entryway, the heater is on your left down here. The main level is roughly about shoulder level, and you can literally touch the walls from between the heater and the couch.

JUDGE MAGILL: From seven feet.

MR. DUNN: It's roughly seven feet; correct, Your Honor, from that point, because you have to measure it at an angle. What Captain Freeman also saw when he was there, he said that there was a wood trim along that main level. That was burned. He also looked at the back of the couch. And that's where the photographs become important. The back of the couch was totally burned away. What that means was that that flaming fire in that entryway was literally reaching around and over the door area and it was getting at the wood trim, and it got up to -- got up in back of that couch, and that's how there was migration. We don't dispute the fact that Bonnie Weisgram died from carbon monoxide from a fire in

that couch. No dispute about that. The dispute is about how the initial fire started. That fire started in that heater, and it was defective.

JUDGE MAGILL: Well, he also testified, you know, that the two controls must have been defective.

MR. DUNN: That's another reason, Your Honor. That was Mr. Lazarowicz. I guess I was talking about Dolence and Freeman in terms of fire cause.

JUDGE MAGILL: Dolence testified.

MR. DUNN: Dolence did not -- Dolence was not put there to talk about the mechanics of the failure. That was Lazarowicz's job.

JUDGE MAGILL: But his opinion differed -- (inaudible).

MR. DUNN: He did, Your Honor. He said -- after he reviewed it, bottom line, he said the fire was caused by this electric baseboard heater based upon his fire analysis. He was never asked by the Fargo Fire Department to explain what was defective, what went wrong. He was asked, "Did this heater start that fire?" He answered that question, "Yes, it did." And when we had to get into explaining why, that's when Lazarowicz came in with his expertise in metallurgy and the fact that these contacts were welded. And, again, I don't mean to confuse the issues here. We're not claiming that there was a design problem in the case. What we're saying is that that heater -- Bonnie Weisgram's heater -- was defective, and that's what the jury found.

JUDGE BRIGHT: What did you say, again?

MR. DUNN: We're not claiming that there was necessarily a design defect for all of these heaters. What we're saying, that our focus was on finding that Bonnie Weisgram's heater was defective; that Bonnie Weisgram's heater started

the fire. That's all we cared about. That's all the focus was on.

JUDGE BRIGHT: Okay. Thank you, Mr. Dunn.

MR. DUNN: Thank you, Your Honor.

CERTIFICATE OF COURT REPORTER

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the audiotape recording of oral argument had before The United States Court of Appeals for the Eighth Circuit on November 16, 1998 in Case No. 97-3735, Chad Weisgram, et al., Appellees, v. Marley Company, Appellants.

Dated this 11th day of December, 1999.

/s/_____
Alvin T. Emineth
Registered Diplomate Reporter

DEC 13 1999

(7)

Supreme Court, U.S.
FILED
DEC 13 1999
OFFICE OF THE CLERK

No. 99-161

IN THE

SUPREME COURT OF THE UNITED STATES

CHAD WEISGRAM, *et al.*,

Petitioners,

v.

MARLEY COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federal court of appeals ought to enter judgment as a matter of law for a defendant when it determines that the district court abused its discretion as gatekeeper and admitted legally insufficient expert opinion evidence, the balance of plaintiff's evidence is insufficient, plaintiff failed to ask for new trial in the district court and in the court of appeals, and the record in the court of appeals presents no reason, compelling or otherwise, to warrant a new trial?

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 corporations representing a broad cross section of American industry. Its corporate members include manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products.[2]

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus curiae* briefs in both state and federal courts, including this Court.

In this case, the Eighth Circuit determined that Petitioner's expert opinion evidence failed to satisfy the requirements of Rule 702 of the Federal Rules of Evidence as explained by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)[3] and that, therefore, there was not a legally sufficient evidentiary basis for the District Court to have submitted the case to

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[1] The parties have consented to the filing of this Brief *Amicus Curiae*. Letters constituting their consent have been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this Brief in whole or in part and that no person other than *Amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this Brief.

[2] PLAC is a non-profit membership corporation formed in June 1983, pursuant to Act 162, State of Michigan Public Act of 1982. PLAC members are listed in the Appendix.

[3] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) had not been decided when the Court of Appeals decided this case. The Court of Appeals determined that the expert evidence at issue should have been excluded under Rule 702 of the Federal Rules of Evidence as unreliable whether or not the *Daubert* approach was employed. *Weisgram v. Marley*, 169 F.3d 514, 518 n.3 (8th Cir. 1999).

the jury. Finding that the Petitioners ". . . had a fair opportunity to prove their claim and they failed to do so," the Court of Appeals entered judgment in favor of the Respondents; the Court of Appeals was not asked to grant a new trial, or to remand for that determination, and it found no reason from its own examination of the Record to exercise its discretion to grant a new trial. *Weisgram*, 169 F.3d at 517 n.2. PLAC member corporations frequently are sued for wrongful death, personal injury or property damage, where the reliability of expert opinion evidence advanced against its members is challenged. Its members have an interest in consistent and proper enforcement of Rule 50 of the Federal Rules of Civil Procedure, which requires that only legally sufficient evidence be considered. Further, its members have fairness interests in finality, and in the conservation of private and public resources. PLAC members have an interest in advocating that, except in the most extraordinary circumstances, proponents of product liability cases are given one full and fair opportunity to present their claims, but no more. PLAC can offer a useful perspective on policy concerns that warrant entry of judgment in insufficiency of evidence cases. Accordingly, *Amicus* has a strong interest in assisting this Court in determining the type of evidence considered by a court in ruling on a motion for judgment as a matter of law, and the appropriate procedural disposition of cases where expert opinion evidence, albeit admitted, is unrealiable and, therefore, not legally sufficient to support the verdict.

SUMMARY OF ARGUMENT

Courts of appeals, when reviewing rulings on motions for judgment as a matter of law, are to consider only legally sufficient evidence – erroneously admitted evidence is not legally sufficient by definition, and is not to be considered. Thus, if, as here, a court of appeals determines

that the district court abused its discretion in performing its gatekeeping function required by Rules 104 and 702 of the Federal Rules of Evidence and *Daubert* by admitting unreliable expert opinion evidence, that evidence does not provide a legally sufficient evidentiary basis to sustain a claim. This practice is mandated by the Federal Rules of Civil Procedure, as explained by the Advisory Committee Notes and the weight of federal case law. A contrary potpourri of cases was spawned in the state court system unaccompanied by any reasoned analysis and should not be followed.

Confronted with an insufficiency determination, judgment as a matter of law ordinarily should be granted. The statutory grant of authority in 28 U.S.C. §2106 certainly provides the jurisdiction, and *Neely v. Martin K. Eby Const. Co., Inc.*, 386 U.S. 317 (1967) makes clear that Seventh Amendment rights are not violated by this practice. A court of appeals ordinarily should exercise its discretion to order judgment, rather than a new trial or remand for that determination. Only when a new trial motion is made in strict compliance with Rules 50(c)(2) and/or Rule 50(d), coupled with some showing of excusable neglect and the existence of evidence that would have remedied the deficiency, should the new trial motion be considered. A rule presumptively entitling the verdict winner to a new trial is not fair to the adversary, would result in an extravagant waste of private and public resources, and would encourage mischief – for example, the practice of holding back with some evidence to use as an argument for a new trial. The entry of judgment is warranted especially when, as here, the verdict winner never asks for a new trial, the Court of Appeals *sua sponte* addresses the new trial question, and finds no evidence to remedy the deficiency.

Entry of judgment by the Court of Appeals does not violate the Seventh Amendment in any respect. Courts of appeals are required, if asked, to review *Daubert* gatekeeping decisions for abuse of discretion. In determining whether the evidence is relevant and reliable, courts of appeals do not re-examine facts. Further, the verdict winner is afforded three opportunities to ask for a new trial, and *Neely* teaches that the Seventh Amendment is not violated by the fact that a court of appeals has the discretion to make the new trial determination on its own.

ARGUMENT

I.

COURTS RULING ON RULE 50 MOTIONS FOR JUDGMENT AS A MATTER OF LAW, OR COURTS REVIEWING SUCH RULINGS ON APPEAL, MUST CONSIDER ONLY LEGALLY SUFFICIENT EVIDENCE.

Petitioner and its *Amicus* press the contention in the first instance that the screening standard for the type of evidence considered by a court in ruling on, or reviewing a ruling on, a Rule 50 motion for judgment as a matter of law, is all *admitted* evidence, whether or not *legally sufficient*. This position is contrary to the express wording of the Rule, is inconsistent with its history and the case law on which the standard is based, and is not good policy.

A. Rule 50 Requires Consideration Only of Legally Sufficient Evidence; The Rule's History Reinforces This Notion. Rule 50 specifically states that a court, in ruling on a Rule 50 motion for judgment as a matter of law, whether before or after the close of evidence or a verdict, must determine whether there is a "legally sufficient evidentiary basis" for a reasonable jury to find for a party on that issue.[4] The Rule is not premised on a consideration of all *admitted* evidence, but only *legally sufficient* evidence; the Rule clearly contemplates a situation where evidence was admitted, yet determined not to be "legally sufficient."[5]

[4] As the courts of appeals review such determinations *de novo*, they apply the same standard. *See, e.g., Finley v. River N. Records, Inc.*, 148 F.3d 913, 917 (8th Cir. 1998).

This Court promulgated the Federal Rules of Civil Procedure on December 20, 1937. The Rules, drafted and revised by an appointed Advisory Committee on Civil Rules, are accompanied by *Advisory Committee Notes* prepared by this Advisory Committee. Though these Notes are not controlling or binding, they are formidable authority for construing the Rules. These Notes are today the principal source of revision history for construing and interpreting the Federal Rules of Civil Procedure. This Court has deemed them a "respected source of scholarly commentary." *Tome v. United States*, 515 U.S. 150, 159 (1995). This Court has instructed that the Notes are properly afforded "weight." *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 444 (1946). *See also, Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988).

Nowhere in the revision history of this Rule is it ever suggested that a determination under this Rule should be based on all *admitted* evidence, whether *legally sufficient* on the issue or not. Prior to 1991, when Rule 50 was revised substantially, the Rule did not expressly articulate the standard for granting a motion for judgment as a matter of law (or motions for a directed verdict and/or for judgment notwithstanding the verdict, as they were known prior to the 1991 revision). *Fed. R. Civ. Proc. 50 Advisory Committee Notes (1991)*. The standard up until that point had been expressed in long-standing case law. *See*

[5] It is of no consequence that the Eighth Circuit in this case determined that the evidence was *inadmissible*. Clearly, it determined that the evidence was *legally insufficient* under standards established by this Court in *Daubert*. It was an unnecessary next step to then say the evidence was thus *inadmissible*.

generally, Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn.L.Rev. 903 (1971), cited in *Advisory Committee Notes* (1991) and cases therein. The revision in 1991 to expressly articulate the standard effected no change in the existing standard. *Id.* The Revisors state. "[t]he expressed standard makes clear that action taken under this Rule is a performance of the court's duty to assure enforcement of the controlling law. . . ." *Fed. R. Civ. Proc. 50 Advisory Committee Notes (1991).* The standard also is used as a standard for the entry of judgment under Rule 56(a), and therefore serves as a link for these two provisions. *Id.* Specifically addressing the application of this standard in a post-verdict motion pursuant to Rule 50(b), the *Notes* state "[i]n ruling on such a motion, the court should disregard any jury determination for which there is no legally sufficient evidentiary basis enabling a reasonable jury to make it." *Id.* There is no basis to argue from the express language of the Rule or the Notes that a court must consider all *admitted* evidence in ruling on a motion for judgment as a matter of law. The contrary is true – the express wording of the standard in Rule 50(a), and its history, support the notion that only *legally sufficient* evidence is to be considered.

B. Federal Case Law Supports the Contention That Only Legally Sufficient Evidence is of Value. The proper practice, that is, to consider all legally sufficient evidence, is followed in a number of Circuits, although in some cases the particular court characterizes the legally insuffient evidence as evidence that should not have been admitted, or suggests that it is excising evidence or ruling on a truncated record; this characterization is of no consequence. For example, in *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997), the Fifth Circuit affirmed the grant of a motion for judgment as a matter of law where the trial court determined that Plaintiff's

expert's evidence was unreliable, and excluded it. Thereafter, the Court granted the Defendant's motion for judgment as a matter of law because, absent this testimony, there was insufficient evidence to take the case to the jury. *But see, Dixon v. International Harvester Co.*, 754 F.3d 573, 580 (5th Cir. 1985). The Eighth Circuit obviously followed this approach in this case, and in *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) and *Peitzmeier v. Hennessey Indus., Inc.*, 97 F.3d 293, 296 (8th Cir. 1996). *But see, Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 360 (8th Cir. 1973). The Sixth Circuit also recently followed this approach in *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 306 (6th Cir. 1997). *But see, Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-1344 (6th Cir. 1992). The United States Court of Appeals for the District of Columbia Circuit has followed this approach. *Scott v. District of Columbia,* 101 F.3d 749, 758 (D.C. Cir. 1997); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 825 n.9 (D.C. Cir. 1988). *Cf., Raynor v. Merrell Pharmaceuticals Inc.*, 104 F.3d 1371, 1372 (D.C. Cir. 1997) (noting that even though this is what in fact the District Court did in *Richardson*, the issue was not briefed or discussed).

The Third Circuit has been the most vocal on this issue, suggesting in *dicta* in *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 115 (3rd Cir.), *cert. denied,* 484 U.S. 853 (1987) that it would follow this approach, which it indeed did seven years later in *Lippay v. Christos,* 996 F.2d 1490, 1501 (3rd Cir. 1993) and *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1199 (3rd Cir. 1993).

The Third Circuit, in *Lightning Lube,* pointed out that its *dicta* in *Aloe Coal* foreshadowed its holding in *Lippay. Lightning Lube,* 4 F.3d at 1199. The Third Circuit acknowledged this Court's *dicta* in *Montgomery Ward and Co. v. Duncan,* 311 U.S. 243, 249 (1940) to the

effect that assertions that the district court erred in admitting or excluding evidence should not be considered in a motion for judgment, but further stated that, to its knowledge, ". . . the Supreme Court never has addressed directly the issue of whether a trial court, in reviewing the sufficiency of the evidence with respect to a motion for judgment, must take the record as presented to the jury and thus cannot enter judgment on a record altered by the elimination of inadmissible evidence." *Lightning Lube*, 4 F.3d at 1199. The Court noted:

> There is a difference between determining whether evidence should be excluded on a motion for judgment as a matter of law and deciding whether a record contains sufficient evidence to sustain a verdict. For example, a litigant moving for judgment as a matter of law may argue as a reason for granting its motion that certain evidence was admitted erroneously because it was prejudicial. It is possible that even excluding such evidence, the jury had a sufficient reason to find against the movant, but the admission of the additional evidence so inflamed it as to affect its deliberations. This might be the case, for example, with bad character evidence introduced pursuant to Fed. R. Evid. 608. In such a case, it clearly would be inappropriate for the district court to rely on this evidentiary error in granting the motion for judgment because the issue of harmful error is distinct from the issue of the sufficiency of the evidence. A different situation is presented, however, where the movant predicates his motion for judgment on a claim that without the inadmissible evidence, there is insufficient evidence to sustain the verdict. We find the court's *dicta* in *Montgomery Ward* is unclear as to whether, in determining a motion for judgment, excluding inadmissible evidence that falls into this latter category is inappropriate.

Lightning Lube, 4 F.3d at 1199 n.26. In *Lightning Lube*, the Court held that it was not to consider improperly admitted evidence of a lawyer's statements in reviewing the sufficiency of evidence sustaining a punitive award asserted in a counter-claim. *Id.* Given this determination, and the insufficiency of the remaining evidence of malice in connection with the punitive damages claim in the counter-claim, the Court concluded that the evidence could not support an award of punitive damages. *Id.*

These cases are but examples from the federal case law of courts without reservation granting judgment to parties when the evidence – even when admitted – is legally insufficient.

C. Contrary Decisions Represent "Precedential Inbreeding," Lack Reasoned Analysis, and Therefore are Unpersuasive. PLAC recognizes that there is contrary precedent. Indeed, as is evident from the preceding discussion, there is contrary precedent in some of the very jurisdictions that follow the traditional practice. The Eighth Circuit's decision in *Midcontinent* represents the first reported instance in which a *federal* appellate court held that it was error for a trial court, in ruling on a motion for judgment notwithstanding the verdict, to do so on a diminished record. It relied in its decision on *dicta* from this Court's decision in *Montgomery Ward*, and on the Supreme Court of New Mexico's decision in *Townsend v. United States Rubber Co.*, 74 N.M. 206, 392 P.2d 404, 406-407 (1964).[6] Both instances of reliance are unper-

[6]The Court in *Midcontinent* also made a passing reference to imputed reliance on the part of the Plaintiff, and suggested that, had the Plaintiff been forewarned during the trial that such evidence was inadmissible, ". . . it conceivably could have supplied further foundation or even totally different evidence." *Id.*, 471 F.2d at 359. However, other than this conclusory statement, no analysis is provided.

suasive, for different reasons, and support PLAC's contention that this is not the better reasoned practice.

In *Montgomery Ward*, this Court discussed the interplay between a motion for judgment notwithstanding the verdict and a motion for a new trial, and held that a court's grant of the motion for judgment does not effect an automatic denial of the alternative motion for a new trial, and, upon a reversal, the defendant is entitled to have the case remanded to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. *Id.*, 311 U.S. at 249. This Court did *not* address the question presented here. The Eighth Circuit apparently relied upon a general discussion by this Court on the interplay between grounds typically advanced in support of a motion for judgment notwithstanding the verdict, and grounds advanced for a new trial, some of which overlap. *Midcontinent*, 471 F.2d at 358. In discussing the grounds advanced in that particular case, the Court stated that the motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment, and gave as an example in *dicta* "that the court erred in rulings on evidence. . . ." *Montgomery Ward*, 311 U.S. at 247. This Court did not hold or suggest that it is inappropriate for a trial court to consider only legally sufficient evidence in ruling on a motion for judgment notwithstanding the verdict, and *Midcontinent*'s reliance on this *dicta*, therefore, is not persuasive.

The Eighth Circuit's reliance in *Midcontinent* on *Townsend* also is not persuasive, but for different reasons. Indeed, the Supreme Court of New Mexico did hold that it is inappropriate to rule on a motion for judgment notwithstanding the verdict on a diminished record after the elimination of evidence submitted to and considered by

the jury. *Id.*, 392 P.2d at 406. The Court took the position that, whether competent or incompetent, *all* evidence submitted to the jury must be considered by a court in ruling on a motion for judgment notwithstanding the verdict, and stated that the proper remedy is a new trial. *Id.* However, rather than presenting a reasoned analysis for these conclusory statements, what follows as support for this assertion is simply a string citation to eleven aged state court decisions. *Id.* at 406 and cases cited therein. PLAC has reviewed each of these decisions and, while it is true that each case holds that the improper admission of evidence in that particular case resulted in the need for a new trial, none of the evidence admitted was expert witness testimony on the part of the Plaintiff's case that was necessary to make out a *prima facie* case. The search for the font of reason for the *Midcontinent* holding thus ends in a dry well. Thus, a "precedent without precedent" was established. A state appellate court holding sprang into existence without any reasoned analysis, and was subsequently parroted by a number of other state appellate courts. Thereafter, it leapt into the federal system in *Midcontinent*, and infected some subsequent decisions. *See, e.g., Schudel v. General Electric Co.*, 120 F.3d 991, 994 (9th Cir. 1996); *Jackson v. Pleasant Grove Health Care Center*, 980 F.2d 692, 695-696 (11th Cir. 1993); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343 (6th Cir. 1992); *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985); *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983).

At a point in the historical development of this aberrant line of cases, the Third Circuit skeptically observed:

> We have carefully examined the opinions from the Fifth and Eighth Circuit, and New Mexico, but re-

> grettably we find no reasoned elaboration to support their thesis that "in ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." . . . The longest discussion appears in New Mexico's Townsend case which, upon analysis, is one conclusory statement piled on another . . . . What results is a classic case of precedential inbreeding where decisions multiply and parrot a holding with no court pausing, first, to identify the competing social, public, or private interests involved, then, to resolve the possible conflicts, and finally, to give public reasons for the resolution.

Aloe Coal, 816 F.2d at 115 (citations omitted).[7]

This brief historical survey explains the origin of those decisions cited by Petitioner and his *Amicus* in support of the assertion that all admitted evidence, even if legally insufficient, must be considered in ruling on a motion for judgment as a matter of law. These decisions sprang from self-proclaimed precedent, without precedent, emanating from dated state court decisions, and should not be followed. Rule 50 makes clear, in its express articulation of the standard, based on federal case law, that only legally sufficient evidence can be considered.

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[7]The Supreme Court of Utah in *Franklin v. Kenton Ray Stevenson*, 1999 Utah LEXIS 95 (1999), adopted a unique approach, rejecting the notion that a JNOV motion could be addressed on an abridged record, but also rejecting the notion that the remedy for the improper admission of evidence is always a new trial. Absent proof of new admissible expert testimony warranting a new trial, the judgment should be reversed. *Id.* at 1.

II.
ABSENT PROOF OF EXCUSABLE NEGLECT, THE ABSENCE OF A LEGALLY SUFFICIENT EVIDENTIARY BASIS TO DEFEAT A RULE 50(b) MOTION SHOULD RESULT IN JUDGMENT RATHER THAN A NEW TRIAL.

Petitioner and its *Amicus* urge the adoption of a rule that *all* cases decided on an insufficiency of the evidence basis warrant a new trial, or, at a minimum, where the insufficiency determination is made by the appellate court, remand to the trial court for a new trial determination. Urging that rule on his facts, Petitioner contends that the Court of Appeals failed to consider whether the Petitioner "might be able" (Pet. Br. at 3) to present additional evidence not offered at the first trial, explicitly stating that there were experts he did not call and implying that there was other evidence not put in evidence that would have made out a *prima facie* case circumstantially. Further, he contends that he could have obtained new experts. Petitioner and his *Amicus* argue that such a rule is necessary because otherwise they will be forced to overtry their cases by calling duplicative expert witnesses, and because they otherwise are not afforded an opportunity to ask for a new trial.

A. Rule 50(d) Permits a Court of Appeals to Enter Judgment as a Matter of Law, to Grant or Deny a New Trial Request, or to Remand to the District Court for That Determination. Pursuant to Rule 50(d), a court of appeals can, in addition to entering judgment, grant or deny a new trial request; this is not the exclusive purview of the trial court pursuant to Rule 50(a), as Petitioner argues. (Pet. Br. at 17). The statutory authority is granted pursuant to 28 U.S.C. §2106, and the Seventh Amendment is not violated by the fact that the courts of appeals can enter judgment, grant a new trial, or remand to the trial court for that determination. *Neely v. Martin K.*

Eby Const. Co., Inc., 386 U.S. 317, 321 (1967). When the motion for judgment as a matter of law is denied in the trial court, and there is an appeal, *Neely* teaches that jurisdiction over the case passes to the court of appeals. *Id.* at 324. At this point, consideration of the new trial question is squarely and exclusively lodged with the court of appeals, as Rule 50(c)(2) no longer applies. *Id.*

Rule 50(d) itself belies Petitioner's assertion that what the Court of Appeals did deprives him of an opportunity to be heard on the new trial question. (Pet. Br. at 19). There were two such opportunities after the case left the trial court – in his Brief as Appellee, and on Petition for Rehearing, neither of which he invoked. As stated in *Neely:*

> In our view, therefore, Rule 50(d) makes express and adequate provisions for the opportunity – which the [party who has verdict set aside on appeal] had without this Rule – to present his grounds for a new trial in the event his verdict is set aside by the Court of Appeals.

Id. at 329. There is no absolute right to have a new trial motion heard by the trial court, as *Neely* makes clear.

Even in those instances where the exercise of a trial court's discretion might be involved in a new trial determination, it is the role of the court of appeals to consider the new trial question "in the first instance." *Id.* at 324. The court's approach admittedly should be "discriminating." *Id.* at 326. There certainly is no reason for the court of appeals not to address the issue when questions of subject matter jurisdiction or dispositive issues of law are raised. *Id.* at 326. Even in instances of insufficiency of evidence rulings where, for example, the new trial request is based on the erroneous exclusion of evidence by the trial court, or where the court itself caused

the insufficiency by imposing too high a burden of proof on the proponent, these still present issues of law ". . . with which the courts of appeals regularly and characteristically must deal." *Id.* at 327. The district court ". . . has no special advantage or competence in dealing with them." *Id.* "Final action on these issues normally rests with the Court of Appeals." *Id.* at 328. The Court stated that, while recognizing that the same issues placed before a trial court will call for the exercise of the court's discretion, ". . . there is no substantial reason why the [party having his verdict set aside on appeal] should not present the matter to the court of appeals, which can if necessary remand the case to permit an initial consideration by the District Court." *Id.* at 328.[8]

Thus, 28 U.S.C. §2106, coupled with Rule 50(d) and this Court's *Neely* decision, make it clear beyond dis-

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[8]Petitioner cites a wholly distinguishable case of this Court, *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967) in support of his contention that the trial could should make the new trial determination. Indeed, this Court did determine in *Iacurci* that the facts there were such that under *Neely*, the Court of Appeals should have remanded to the trial judge for determination. *Id.* at 88. However, in *Iacurci*, the jury had failed to answer numerous questions on a special verdict form, despite explicit directions to do so. *Id.* As this Court noted, this chould have been for a number of reasons. *Id.* at 87-88. Perhaps, indeed, the jury did intend to resolve those questions in Defendant's favor, but the jury might also have been unable to agree on these issues, or it simply might not have passed upon them because it already had determined negligence on another ground. *Id.* at 87. This Court determined that the case should have been remanded to the trial judge, who was in the best position to pass upon this question, given the evidence, his charge to the jury, and the jury's verdict and interrogatory answers. *Id.* at 88. The question in *Iacurci*, unlike the question in *Neely* and the question in this case, is not the type of question "regularly and characteristically" dealt with by courts of appeals. *Neely*, 386 U.S. at 327. What is important is that *Iacurci* was decided within the *Neely* framework and is indeed completely consistent with it.

pute that, in addition to ruling on a new trial request, or remanding for that determination, a court of appeals can enter judgment as a matter of law.

B. Cases Decided on an Insufficiency of the Evidence Basis Warrant Judgment, Not a New Trial, Absent Proof of Excusable Neglect. For reasons of fairness and conservation of private and public resources, parties who have had a full and fair opportunity to present their case, later deemed insufficient pursuant to Rule 50(b), should not be awarded a new trial; judgment ordinarily should be entered against them, absent a request for a new trial made in strict compliance with Rule 50, and absent actual proof of some type of excusable neglect that resulted in evidence not being offered in the first trial. Even in such a case, certain showings of sufficiency should be required – a new trial should not be automatic, even in these cases. It must remembered that Rule 50 was adopted for the purpose of speeding litigation and avoiding unnecessary retrials. *Montgomery Ward*, 311 U.S. at 250.

Fairness concerns predominate. In the typical case, both parties, not just the party seeking the new trial, presumably have been involved in litigation for a period of months and years in complex cases, at varying levels of expense – dramatically greater expense in sophisticated and complex product liability litigation. Discovery has been conducted, as well as motions practice and trial, all of which take a toll both financial and emotional, but with some solace at the thought of finality, at least in the trial court level. These parties have, presumably, played by and within the Rules – what fairness is there in forcing the party who obtains judgment on a Rule 50 basis and who has played by the Rules and won to try the case again? A rule permitting automatic retrials on a reliance basis – imputed or actual – could result in repetitive re-

trials as well. Certainly, this does not advance the goals of the timely, efficient and final disposition of litigation.

Weight should be given to the resources expended – public and private. Absent proof of some type of excusable neglect and the availability of evidence that would have remedied the deficiency, a new trial is a wasteful exercise for all concerned. Courts and counsel are too busy to waste resources on repeat litigation absent a compelling reason to the contrary.

A "reliance" rule, whether that reliance is imputed or actual, does not strike a fair balance between the fairness needs of the parties, as well as concerns for judicial efficiency and conservation of economic resources. An imputed reliance rule should be rejected outright. No showing is required. There is no way to evaluate the claim of reliance, and it would result in a presumptive retrial in every instance. Further, any rule based on actual reliance – which at first blush may hold some appeal – would encourage mischief. The rule should not create an incentive to withhold voluntarily the presentation of evidence so that the litigant could then later argue for a new trial for the reason that, in reliance on the court's rulings, it withheld evidence – for "strategy reasons." Alternatively, such a rule could create an incentive to try certain types of cases in the first instance solely to ferret out defense strategy – this is a "win-win" proposition for plaintiffs. Either they win on the first try and the verdict is affirmed, or they go back to trial with their withheld expert, but this time with the benefit of a dissection of defense strategy. The instant situation, where a trial has occurred, is a much more compelling situation devoid of any basis for reopening discovery to obtain new experts. A rule that would require proof of excusable neglect, coupled with the presentation of evidence that would have reme-

died the situation, should be required before a new trial is granted.[9]

Plaintiffs' fairness concerns are more than adequately addressed by such a practice. Counsel ought to be aware of the evidence required under the controlling substantive law to make a *prima facie* case – particularly the types of expert opinion evidence that will be required. Rule 16 scheduling orders provide clarity and certainty as to the time available to locate, develop and identify expert witnesses, and also provide ample time for preparation of Rule 26(b) information.[10] The district court has the discretion to extend dates in the scheduling order for good cause shown. Competent counsel in complex litigation certainly know or should know the requirements imposed by Rule 702 of the Federal Rules of Evidence and *Daubert* that the testimony be relevant and reliable. Counsel certainly know or should know that expert opinion testimony in all likelihood will be challenged – they are on notice that their experts need to be qualified, and express opinions that are relevant and reliable. In short, counsel are or should be on notice that they better come to court with experts who are qualified and who have reliable opinions. They are further on notice that the trial court's gatekeeping discretion is wide,

[9] Any suggestion that a new trial should be granted so that discovery can be re-opened and new experts obtained, as Petitioner suggests, destroys the balance attempted in the fairness equation. There simply is no justification for it. No such practice exists when Rule 56 motions are granted. Defendants successful in *Daubert* issues at the pretrial stage frequently couple these motions with summary judgment motions contingent on the outcome of the expert issues. Those who have summary judgment entered against them in this scenario are not afforded an opportunity to re-open discovery and retain new experts.

[10] Also, in many instances, plaintiffs are able to locate and develop expert witnesses at their leisure even before suit is filed. Defendants have no such luxury.

and will be reversed only for abuse of discretion. In short, it is not a revelation that a court, trial or appellate, may find expert witnesses unqualified: litigants who proffer unqualified experts, or experts who express unreliable opinions, do so at their peril. With ample time to develop expert evidence, and well-marked substantive and procedural roadmaps, fairness does not require a second chance, except in the most extraordinary of circumstances.

C. A New Trial is Not Warranted in This Case. The Eighth Circuit ruled on the new trial question here, as it was required to do under *Neely, even though* Petitioner did not, as Appellee and pursuant to Rule 50(d), ask for a new trial, either in his Brief or in his Petition for Rehearing (or ask for a new trial conditionally in the trial court pursuant to Rule 50(c)(2)). The Eighth Circuit ruled that a new trial was not warranted. In such a case, where Appellee presents no new trial issue in his Brief or in a Petition for Rehearing, the court may in any event order a new trial on its own motion or refer the question to the trial court. *Neely*, 386 U.S. at 329. There was no other evidence – the Court of Appeals so determined. The Court of Appeals' decision not to grant a new trial, reviewable only for an abuse of discretion, is sound.[11]

The Court of Appeals did not have before it, and therefore did not address, any contention that a new trial was warranted because there were withheld experts, for the simple reason that Petitioner failed in his obligation – clear since the enactment of Rule 50(d) in 1963 and certainly since this Court's decision in *Neely* – to bring these grounds to the attention of the Court of Appeals. As this

[11] Petitioners make clear, as they must, given this Court's Order, that they are not asking this Court to review the Record to reach its own conclusion as to sufficiency of the evidence. (Pet. Br. at 19).

Court makes clear, both in its decisions and its Rules, its normal policy is not to review such questions. *Neely*, 386 U.S. at 330. There is no reason to deviate from that policy here.

III.
THE EIGHTH CIRCUIT DECISION IN *WEISGRAM* DOES NOT INVOLVE A DENIAL OF A RIGHT TO JURY TRIAL OR A RE-EXAMINATION OF FACTS IN VIOLATION OF THE SEVENTH AMENDMENT.

Petitioner and his *Amicus* appear to advance three somewhat interwoven arguments premised on an asserted violation of the Seventh Amendment. They appear to argue that (1) the Seventh Amendment was violated by the Court of Appeals when it reviewed the trial court's exercise of its gatekeeping function because, in their view, it re-examined the facts; (2) the Seventh Amendment was violated because Petitioner was denied an opportunity to ask for a new trial; and (3) alternatively, the Seventh Amendment was violated when the Court of Appeals ruled on the new trial question, rather than allowing the trial court to do it. In each case, PLAC contends that the issue is not presented for review, but that, in any event, the Seventh Amendment is not compromised by anything that occurred here.

A. The Findings of Insufficient Reliability. It is the normal policy of this Court not to consider issues which have not been presented to the courts of appeals, and which are not properly presented for review in this Court. *See Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967). Such is the case here.

Petitioner's argument that the Seventh Amendment was violated by the Eighth Circuit in its review of the reliability of the expert opinion evidence pursuant to *Daubert*, is simply an effort to "back-door" substantive

review of the Eighth Circuit's decision that this evidence should not have been admitted; review of this issue was sought in this Court, and the Court issued its *writ* only on Question 2. This argument essentially is that the Court of Appeals erred in excluding the testimony, and the argument is that the Court erred in part for constitutional reasons and in part for *Daubert* reasons, even though the argument is clothed exclusively as a Seventh Amendment argument. For example, one of the challenges asserted by Petitioner's *Amicus* is that the Court of Appeals failed to compare the methods used by the experts here with those used in the relevant scientific community. (Am. Brief at 13). The issue of whether the Court of Appeals erred in holding that the expert evidence was inadmissible is simply not before this Court, and it makes no difference whether the arguments advanced to support that contention are premised on the Seventh Amendment, or are premised on *Daubert*.

On the merits, no "factual re-examination" occurred. The Eighth Circuit's decision was not premised on an evaluation of the weight of the evidence, or on credibility determinations, but ratther on the reliability of the evidence according to a recognized legal, not factual, standard. That determination in turn warranted a finding that there was not a legally sufficient evidentiary basis for sending this case to the jury.

At issue in *Weisgram* was the reliability of expert opinion testimony admitted in Petitioner's case. The Eighth Circuit determined this testimony was not reliable, both for reasons of inadequate qualification, and, in two instances, because the opinion testimony was not founded on a reasonable factual basis. *Weisgram*, 169 F.3d at 519, 520, 521.

Petitioner's and his *Amicus'* attempts to categorize these determinations as a weighing of the evidence or as a finding of fact are belied clearly by the decision itself:

(1) The Court stated that the motion for judgment as a matter of law presents a legal question both to the District Court and to it on review: whether there is sufficient evidence to support a jury verdict (*Id.* at 517);

(2) The Court recognized that the District Court's charge under Rule 702, as refined in *Daubert*, is to make sure admitted testimony is both relevant and reliable (*Id.*);

(3) The Court recognizes the admittedly broad discretion of the trial court to admit expert opinion testimony (*Id.*); and

(4) The Court found portions of the testimony of each three to be unreliable, in the case of Freeman and Dolence in part because they were not qualified to offer opinions that the heater malfunctioned, and in the case of Freeman, Dolence, and Dolese, for the additional reason that there was no factual basis for their reconstruction of events, or to support their testimony. *Id.*, 169 F.3d at 519, 520, 521.

The Circuit Court's determinations that this expert evidence was unreliable, and that there was insufficient evidence to sustain the jury verdict, were determinatons of questions of law. *Daubert* made clear that district courts must screen expert opinion evidence to ensure that admitted expert evidence is relevant and reliable. Circuit courts certainly have the authority to review trial courts' decisions to admit or exclude expert testimony under *Daubert* and *General Elec. Co. v. Joiner*, 522 U.S.

136 (1997). The Court made clear in *Joiner* that the question of admissibility of expert testimony is not an issue of fact. *Joiner*, 522 U.S. at 142.

If a district court can determine to admit or exclude expert evidence, then certainly the courts of appeals, consistent with the Seventh Amendment, can determine whether the district court abused its discretion. It is settled that review of a determination by a district court under an abuse of discretion standard presents a question of law. *Joiner*, 522 U.S. at 142. Whether defined as "a definite and firm conviction that the trial court committed a clear error of judgment," *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989); or "an 'absolute absence of evidence to support the jury's verdict' " *Seidman v. American Airlines, Inc.*, 933 F.2d 1134, 1140 (5th Cir. 1991); or "(1) the court's decision is "clearly unreasonably, arbitrary or fanciful'; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence on which the district court rationally could have based its decision," *Heat and Control, Inc. v. Hester Industries, Inc.*, 785 F.2d 1017, 1022 (Fed. Cir. 1986), the standards for reviewing for abuse of discretion clearly present an issue of law, not fact. Here, the Eighth Circuit's determinations that the trial court abused its discretion in admitting the evidence, and without it, the verdict therefore was not supported by legally sufficient evidence, were determinations of questions of law. Such a ruling plainly is consonant with the Seventh Amendment.

Petitioner's *Amicus* cites *Hetzel v. Prince William County*, 523 U.S. 208 (1998) in support of its position. However, in that case, in distinguishing *Neely*, this Court in effect distinguished the *Weisgram* case when it said that:

> . . . that case dealt with the application Fed. Rule Civ. Proc. 50(d) in a situation where the Court of Appeals had held that the evidence was insufficient to support a finding of liability. It did not involve overturning an award of damages where the evidence was found sufficient to support a finding of liability.

Id. at 209.

B. Ability to Have New Trial Motion Heard. The second aspect of the Seventh Amendment issue, that is, that this Amendment somehow is implicated in the Court of Appeals' Footnote No. 1 rejecting the notion that a new trial is warranted, also is not before the Court. This is for the simple reason that, despite procedural mechanisms in place affording Petitioner an opportunity at several different levels to ask for a new trial, Petitioner never did. Rule 50(c)(2) of the Federal Rules of Civil Procedure provided Petitioner with an opportunity to ask for a conditional new trial in the trial court level. Further, Rule 50(d) afforded Petitioner an opportunity to ask for a new trial in the Court of Appeals. This was not done. These same reasons also answer the claim on the merits.

It simply is not the case that Petitioner never had an opportunity to ask for a new trial. There were three opportunities, none of which were invoked.

C. Decision by Court of Appeals Not to Grant a New Trial. Petitioner, confronted with an express indication that the Court of Appeals *sua sponte* considered the new trial question, argues in the alternative that there is a constitutional requirement that the new trial question be addressed by the trial court, rather than the Court of Appeals. Petitioner suggests, with passing references to *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), *Iacurci*, and *Neely*, that the Seventh Amendment is implicated when a court of appeals makes a

new trial determination pursuant to Rule 59(a), rather than sending the case back to the trial court. This argument is never developed, other than to boldly state that such a ruling deprives Petitioner of his right to jury trial.

This issue is resolved by Rule 50(d) of the Federal Rules of Civil Procedure, as construed by the Court in *Neely*. In *Neely*, a diversity death action premised on common law principles, a Plaintiff's verdict resulted. Post-verdict JNOV and new trial motions were denied, and an appeal was noted. On appeal, appellee, verdict winner below, urged *only* for the verdict to be upheld; no new trial motion was made. The Court of Appeals determined that the evidence in the trial court was insufficient on issues of negligence and causation, and reversed, with instructions to dismiss the Complaint. The issue in the Supreme Court was whether the Court of Appeals could direct the trial court to dismiss the Complaint, in the face of the Seventh Amendment and in the face of Rule 50(c)(2), which gives a party whose jury verdict is set aside by a trial court ten days in which to invoke the trial court's discretion to order a new trial.

This Court held that the Court of Appeals could, consistent with both the Federal Rules of Civil Procedure and the Seventh Amendment, so order. *Id.*, 386 U.S. at 322. The Court first determined that there is no constitutional bar (Seventh Amendment) to an appellate court granting a motion for judgment notwithstanding the verdict. *Id.* The Court noted that it is settled that Rule 50(b) does not violate the Seventh Amendment's grant to right of a jury trial, and that there is no greater restriction on the province of the jury when an appellate court grants a JNOV motion than when the trial court grants it. *Id.*

Turning from the Constitution to the Federal Rules of Civil Procedure, the Court held that, once the case is in the Court of Appeals, Rule 50(d)—not Rule 50(c)(2)—controls. *Id.* at 323. Rule 50(d) mandates that consideration of the new trial question is at that point lodged with the courts of appeals. *Id.* Rule 50(c)(2) regulates new trial procedure only if the trial court grants the JNOV motion, which did not happen on these facts. *Id.*

In the face of a contention that courts of appeals are not equipped to rule on certain new trial issues, the Court recognized as a concern, and as concern of Rule 50(d), the protection of the rights of the party whose verdict has been set aside and who may have valid grounds for a new trial. *Id.* at 325. Many of these questions, noted the Court, present questions of law, which courts of appeals "regularly and characteristically" must address. *Id.* at 327. But, noted the Court, even with questions that could call for the exercise of a trial court's discretion, there is no "substantial reason" why the courts of appeals should not in the first instance consider the question, as those courts can, if necessary, remand to permit initial consideration by the trial court. *Id.* at 328.

The Court noted that a party in the verdict winner's position has three opportunities to ask for a new trial, the first in the district court, and then in the courts of appeals as appellee or, if filed, in a petition for rehearing. *Id.* at 329. A court of appeals can also *sua sponte* order a new trial. *Id.* Indeed, noted the Court, it is incumbent upon the courts of appeals to visit the issue, even if not raised by the parties. *Id.*

Tellingly, however, the Court in *Neely* did not rule on the new trial question. Petitioner had not suggested new trial grounds in the Court of Appeals, nor did she petition for rehearing in the Court of Appeals. Further, this

Court would not assume that the Court of Appeals ignored its duty to address the question, though noting that it would have been better had its Opinion expressly dealt with the new trial question. *Id.* Accordingly, given its normal policy of not considering issues which have not been presented to the courts of appeals, the new trial question was not addressed. *Id.*

Petitioner hints at but never develops an argument that assigning responsibility to the courts of appeals to grant or deny new trial requests, rather than remanding, is incompatible with this Court's decision in *Gasperini.* (Pet. Br. at 17). The *Gasperini* holding does not support the proposition for which it is advanced. The issue in *Gasperini* was the Seventh Amendment's bearing on the allocation of authority as between trial courts and appellate courts to review verdicts. *Gasperini,* 311 U.S. at 432. There, confronted with the issue of whether the federal court system could, consistent with the Seventh Amendment, accommodate a state statute requiring an appellate court to apply a "deviates materially" standard for excessive jury verdicts, the Court held that the federal trial judge should apply the standard, with federal appellate control limited to review for abuse of discretion. *Id.* at 433-438. Recognizing the large authority of a trial court to grant a new trial, and the "relatively late and less secure" development of appellate review of a federal trial court's denial of a motion to set aside a jury's verdict, the Court determined that this allocation of responsibility comported well with the Seventh Amendment, as nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside a jury verdict as excessive. *Id.* at 435.

The issue in *Weisgram,* as presented by Petitioner, is far different—the issue is whether the Seventh Amend-

ment re-examination clause is violated when a court of appeals itself addresses the new trial request in the first instance, where the purported basis for the request is that the appellee ought to be afforded a new trial to reopen discovery and identify additional witnesses. *Weisgram*, 169 F.3d 514, 517 n.2. The Seventh Amendment prevents "re-examination" of "facts tried by a jury." Consideration by the courts of appeal of whether a new trial should be awarded for the presentation of new evidence is not a "re-examination" of "facts tried by a jury," but rather, just the opposite. Further, such questions are within a class of issues described in *Neely*—typically questions that the district court has no special advantage or competence in dealing with. *Neely*, 386 U.S. at 328.

Nothing done by the Court of Appeals compromised the Seventh Amendment. Review by a court of appeals of a district court's gatekeeping function on an abuse of discretion standard does not involve a re-examination of facts. Petitioner was afforded three opportunities to address the new trial question—none of which she took. As the Court of Appeals said, "[t]his is not a close case." *Weisgram*, 169 F.3d at 517.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

1999 CORPORATE MEMBERS

3M
Allegiance Healthcare Corporation
American Home Products Corporation
American Medical Systems, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Andrx Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Atlantic Richfield Company
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Becton-Dickinson & Company
Bic Corporation
BIOMET
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bombardier Inc., Recreational Products
Bridgestone/Firestone, Inc.
Briggs & Stratton
Brown and Williamson Tobacco Company
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Caterpillar, Inc.
Clark Material Handling Company
Coleman Company, Inc., The
Continental General Tire, Inc.
Coors Brewing Company
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Digital Equipment Corporation
Dow Chemical Company, The
E. & G. Gallo Winery
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estēe Lauder Companies

Exxon Corporation, U.S.A.
FMC Corporation
Ford Motor Company
Fortune Brands, Inc.
Freightliner Corporation
Gates Corporation, The; Stant Corporation
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Co.
Global Industrial Technologies, Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Heil Company, The
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
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Johnson Controls, Inc.
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Kraft Foods, Inc.
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Medtronic, Inc.
Melroe Company
Mercedez-Benz of N. America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Motor Coach Industries International, Inc.
Navistar International Transportation Corp.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co., The
Raymond Corporation, The

Raytheon Aircraft Company
Rheem Manufacturing
RJ Reynolds Tobacco Company
Rover Group, Ltd.
Schindler Elevator Corp.
SCM Group USA, Inc.
Sears, Roebuck and Company
Shell Oil Company
Sherwin-Williams Company, The
Siemens Corporation
Smith & Nephew, Inc.
Smithkline Beecham Corporation
Snap-On Incorporated
Sofamor Danek Group, Inc.
Solutia Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Taylor Wharton Gas Equipment, A Division of Harsco
Tenneco Automotive
Terex Corporation
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.

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In the Supreme Court of the United States

CHAD WEISGRAM, ET AL., PETITIONERS,

v.

MARLEY COMPANY, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* FOR BRUNSWICK CORPORATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 28 U.S.C. § 2106 authorizes a federal court of appeals to order judgment as a matter of law for the defendant where the plaintiff's expert testimony was inadmissible, the balance of the proof was insufficient to sustain the verdict, and the plaintiff failed to establish in either the court of appeals or the district court that he was in any way precluded from submitting his best evidence.

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BRIEF *AMICUS CURIAE* FOR BRUNSWICK CORPORATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The issue in this case is of direct concern to *amicus* Brunswick Corporation.[1] Brunswick is the appellant in an antitrust case now pending before the Eighth Circuit in which it has requested that the court of appeals, as it did here, overturn a jury verdict that rests on speculative and unreasonable expert testimony and order entry of judgment as a matter of law ("JAML").[2] In that case, plaintiffs alleged that through acquisitions of boatbuilders, and by offering boatbuilders and boat dealers discounts based on buying certain percentages of their engine needs from Brunswick, Brunswick monopolized the market for stern drive and inboard marine engines.

Plaintiffs premised their entire case—liability, causation, and damages—on the theory of their sole expert witness, economist Dr. Robert Hall. Hall opined that, in a competitive market with two engine manufacturers, each would have an equal market share. Thus, any market share above 50% derived from anticompetitive conduct. Based on that artificial assumption, plaintiffs contended that Brunswick's higher market share was attributable to unlawful discounts and acquisitions and necessarily resulted in monopolistic "over-

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[1] The written consents of the parties to the filing of this brief have been lodged with the Clerk. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Concord Boat Corp.* v. *Brunswick Corp.* (8th Cir.).

charges" for its engines. The jury found for plaintiffs on that theory, awarding them more than $133 million after trebling.

Because Hall's theory was unsupported by record evidence, unreasonable, and contrary to fundamental antitrust principles, Brunswick's position on appeal (as it had been in motions *in limine* and for JAML) was that Hall's testimony could not sustain a jury verdict for plaintiffs. Since Hall's conjectural and methodologically unsound theory was essential to the jury verdict—yet could not support it—the disposition on appeal could only be judgment as a matter of law for Brunswick.

Brunswick has expended large amounts of time and money in the *Concord Boat* case, and the size of the jury award against it is staggering. Brunswick has a direct interest in this Court's reaffirmation of the principle that courts of appeals have discretion (and in some cases, such as Brunswick's, have an obligation) to direct judgment for defendants when it is apparent that a jury verdict cannot stand due to insufficient or inadmissible expert testimony. Brunswick has experience with complex, protracted cases, where the automatic retrial rule proposed by petitioner would lead to a highly unreasonable consumption of judicial and private resources. Brunswick therefore has a substantial interest in urging that, when a court of appeals reverses a district court for the inadequate performance of its *Daubert*[3] gatekeeping functions, its option to direct judgment for the defendant is preserved.

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[3] *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

STATEMENT

In December 1993, Bonnie Weisgram was killed in a fire at her home. A fifteen-year-old baseboard heater located in Weisgram's entryway and manufactured by respondent Marley Company ("Marley") was investigated as one of the possible causes of the fire. On July 31, 1995, Weisgram's son, petitioner Chad Weisgram (individually and on behalf of her heirs) filed suit against Marley for the wrongful death of his mother. Petitioner brought his claim under a strict products liability theory and so was required to prove that a defect in the heater proximately caused his mother's death. Pet. App. A-3 to A-5.

The trial commenced in May 1997, during which both parties offered expert testimony regarding the cause of the fire. Following eight days of trial, the jury returned a verdict in favor of petitioner. Marley moved for judgment as a matter of law and, in the alternative, for a new trial, arguing in part that petitioner's expert testimony was inadmissible and, therefore, that the evidence was insufficient to support the verdict. The motions were denied. Pet. App. A-4 to A-5, A-29.

The Eighth Circuit reversed and ordered entry of judgment as a matter of law for Marley. The majority held that the opinions of petitioner's three "experts"—who were the only witnesses to testify that the heater was defective in design or manufacture—should not have been admitted because they were unreliable and speculative. Pet. App. A-6 to A-7. Without that testimony, petitioner necessarily failed on an essential element of his products liability

claim and the "jury's verdict [could] not stand." *Id.* at A-17.

Before reaching its decision, the Eighth Circuit conducted a comprehensive review of "the entire transcript of the trial in this case" and determined that petitioner "had a fair opportunity to prove [his] claim [but] failed to do so." The court explained that petitioner was not entitled to a "new trial" that would "reopen discovery" and allow testimony from "additional witnesses" who were never identified. Pet. App. A-16, A-5 to A-6 n.2. In the district court, there had been ample time for discovery, preclusive deadlines were instituted for the exchange of expert reports, and a final pretrial order was entered which identified all the evidence that could be introduced at trial. Petitioner was also on full notice that Marley would challenge his experts. Marley moved *in limine* to prohibit petitioner's experts from testifying at trial because their opinions were inadmissible under Fed. R. Evid. 702 and *Daubert* as "speculative" and lacking adequate scientific or factual foundation. Marley then reasserted those objections to the expert testimony in its motions for judgment as a matter of law. J.A. 75, 123; C.A. App. 109, 111, 294.

Judge Bright dissented, concluding that, if the district court did in fact err in admitting the expert testimony, "the relief to be awarded is a new trial, not judgment as a matter of law." Pet. App. A-26. Judge Bright nowhere claimed that a new trial was warranted to remedy erroneous instructions or evidentiary rulings in the court below, nor did petitioner advance any such argument in either the district court or the court of appeals. Judge

Bright, like petitioner, advocated a rule of automatic retrial, regardless of whether the verdict-winner shows a factual basis for such relief.

This Court declined to grant certiorari to review the majority's conclusion that petitioner's expert testimony was inadmissible. Thus, the only issue before the Court is whether it was improper for the Eighth Circuit to enter judgment as a matter of law for Marley, *even though* it found that petitioner's evidence of liability was legally insufficient and petitioner never argued that he was in any way precluded from putting on his best case.

SUMMARY OF ARGUMENT

Decisions of this Court and the federal courts of appeals establish that when a court of appeals reverses a jury verdict for a plaintiff, it may direct judgment as a matter of law for the defendant based on insufficiency of the evidence. Judgment as a matter of law should be granted if the plaintiff does not proffer sufficient *admissible* evidence to create a jury question.

That appellate courts can overturn a jury verdict as a matter of law is borne out by the broad and explicit grant of jurisdiction to those courts under 28 U.S.C. § 2106 to "reverse any judgment" and "direct the entry of such appropriate judgment" as "may be just under the circumstances." The plain implication of Fed. R. Civ. P. 50, as substantiated by its history and appellate practice, is the same: courts of appeals have the authority and discretion to direct judgment for the verdict-loser. Moreover, viewed as a cohesive whole, the Federal Rules of Civil Procedure are directed towards

achieving the efficient dismissal of *any* claim or defense as soon as it is apparent that it is legally insupportable.

The contrary view espoused by Judge Bright in his dissent below conflicts squarely with this Court's decision in *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), which held that there is "nothing" in the federal rules that suggests "that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Id.* at 324. If, without expert testimony held inadmissible on appeal, the evidence tendered by the plaintiff at trial is legally insufficient, concerns of fairness and efficiency are properly resolved by allowing the court of appeals to decide whether to enter JAML, remand for a new trial, or remand for consideration whether to grant a new trial. Where, as here, the appellee offers the court of appeals no factual basis for believing that a new trial is required, the court of appeals may direct entry of JAML without a remand. The appellate court is well situated to "make final disposition of the issues presented." *Id.* at 329.

Besides contravening legal principles recognized in this Court's decisions, a reversal of the Eighth Circuit's holding would have detrimental practical consequences, particularly where the underlying suit is protracted and complicated. If complex, lengthy, and expensive cases such as Concord Boat's antitrust suit against Brunswick could routinely be retried in spite of deficient expert testimony, there would be a needless waste of public and private resources and an unjustifiable burden on the federal court system. Furthermore, carving out an exception that allows for easy retrial in suits where an inadmissible expert opinion is introduced would encourage the submission of dubious proof. The plaintiff could gamble on "cheap and easy" expert testimony with knowledge that he always has the safety net of a new trial should he fail.

ARGUMENT

I. THE EIGHTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION IN ORDERING JUDGMENT AS A MATTER OF LAW.

A. The Automatic Retrial Rule Advocated By Petitioner Is Contrary To The Weight Of Authority In The Federal Courts Of Appeals.

Petitioner urges this Court to adopt the unwavering rule espoused by Judge Bright in his dissent below that, when a court of appeals deems a plaintiff's expert testimony to be so defective that it is inadmissible, the court's only option is to order a new trial; judgment as a matter of law for the defendant is not an option. Petitioner contends that this accords with the established practice of appellate courts. Pet. Br. 23, 27. Yet as the majority below succinctly explained, when plaintiffs have had their day in court, there is "no reason to give [them] a second chance to make out [their] case." Pet. App. A-5 n.2. Before turning to how this conclusion is supported by this Court's precedents and the controlling statute and rules, it is useful first to examine the genesis of the handful of erroneous decisions in which Judge Bright and petitioner put such stock.

Courts of appeals across the country have long recognized that if a plaintiff's expert testimony does not suffice to create a jury question, judgment as a matter of

law for the defendant is appropriate. Depending on the situation, it may even be required. As the Fifth Circuit held over thirty years ago, when faced with an expert opinion that leaves "gaping chasms in the [plaintiff's] proof," the "*compelled*" result is reversal of the jury verdict and entry of judgment for the defendant. *Insurance Co. of N. Am.* v. *Chinowith*, 393 F.2d 916, 918, 920 (5th Cir. 1968) (emphasis added). Accord *Atchison, T.&S.F. Ry.* v. *Hamilton Bros.*, 192 F.2d 817, 822 (8th Cir. 1951); *Ralston Purina Co.* v. *Edmunds*, 241 F.2d 164, 170 (4th Cir. 1957).

Subsequently, Judge Donald Lay, writing for the Eighth Circuit, introduced an unprecedented detour in the law by refusing to approve of JAML where expert testimony was inadmissible. In *Midcontinent Broadcasting Co.* v. *North Central Airlines, Inc.*, 471 F.2d 357 (8th Cir. 1973), the district court had awarded defendant judgment as a matter of law after determining that expert testimony on the sole matter in dispute was inadmissible and, thus, insufficient to support the verdict. Relying primarily on a decision by the Supreme Court of New Mexico, Judge Lay reversed and announced categorically that "the proper remedy to correct any evidentiary error * * * is a new trial." He maintained that all evidence submitted to the jury, both competent and incompetent, must be evaluated in ruling on a post-verdict motion for judgment as a matter of law. This supposedly avoided "plac[ing] plaintiff in a relative position of unfair reliance." *Id.* at 359. "If plaintiff had been forewarned during the trial that such testimony was not admissible it conceivably could have

supplied further foundation or even totally different evidence." *Ibid.*[4]

Other appellate courts have since echoed this "unfair reliance" theory and repeated Judge Lay's reasoning. See, *e.g.*, *Persinger* v. *Norfolk & W. Ry.*, 920 F.2d 1185, 1186, 1189 (4th Cir. 1990); *Sumitomo Bank* v. *Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Douglass* v. *Eaton Corp.*, 956 F.2d 1339, 1343-1344 (6th Cir. 1992); *Schudel* v. *General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997); *Kinser* v. *Gehl Co.*, 184 F.3d 1259, 1267 (10th Cir. 1999). Yet notwithstanding decisions of individual panels, most of these same circuits—notably, the Fourth, Fifth, Sixth, Eighth, and Tenth—have freely exercised their power to direct judgment for the defendant where expert testimony is inadequate to justify a jury verdict for the plaintiff. *E.g.*, *Redman* v. *John D. Brush & Co.*, 111 F.3d 1174, 1178-1180 (4th Cir. 1997) (reviewing only "the competent portions of [expert's] testimony" in granting JAML); *Lawrence* v. *General Motors Corp.*, 73 F.3d 587, 590 (5th Cir. 1996) (ordering JAML due to insufficient expert testimony); *Smelser* v. *Norfolk S. Ry.*, 105 F.3d 299, 306 (6th Cir. 1997) (reversing denial of

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[4] Judge Lay cited *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 248 (1940), which implied in *dicta* that a trial court's mistakes in admitting evidence should not be considered on a motion for judgment. But Judge Lay overlooked *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), the leading case in this area, which, as demonstrated *infra*, firmly establishes the ability of federal appellate courts to order judgment as a matter of law due to evidentiary insufficiency. Subsequent decisions following Judge Lay's reasoning have likewise failed to take account of this Court's controlling decision in *Neely*.

JAML because expert's testimony was inadmissible); *Wright* v. *Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) (same); *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 968-969 (10th Cir. 1994) (granting JAML where expert testimony could not support jury verdict). The Third and D.C. Circuits have consistently acknowledged and adhered to this traditional practice. *E.g.*, *Lightning Lube, Inc.* v. *Witco Corp.*, 4 F.3d 1153, 1198-1200 (3d Cir. 1993) (JAML should be entered if vital expert testimony is inadmissible); *Scott* v. *District of Columbia*, 101 F.3d 748, 758, 760 (D.C. Cir. 1996) (reversing denial of JAML where expert testimony was insufficient).

The line of cases that grew out of *Midcontinent* is, then, an aberration. And it is an aberration without any reasoned explanation. As pointed out by the Third Circuit in *Aloe Coal Co.* v. *Clark Equipment Co.*, 816 F.2d 110, 115 (1987):

> We have carefully examined the opinions [following *Midcontinent*] but regrettably we find no reasoned elaboration to support their thesis that "[i]n ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence." The longest discussion appears in New Mexico's *Townsend* case which, upon analysis, is one conclusory statement piled on another. What results is a classic case of precedential inbreeding where decisions multiply and parrot a holding, with no court pausing, first, to identify the competing social, public, or private

> interests involved, then, to resolve the possible conflicts, and finally, to give public reasons for the resolution.

(Citations omitted). The "closest to an explanation" offered—the putative reliance of the plaintiff on evidence admitted at trial—"does not address either the competing reliance concerns of the defendant, or the homespun axio[m] that a litigant is entitled to only one bite of the apple." *Id.* at 115-116. The unsubstantiated policy assumptions of the *Midcontinent* decisions cannot, in short, justify an automatic retrial rule. They suggest no reason for departing from this Court's decisions, which entitle a defendant to JAML unless the plaintiff, who has tendered "speculative" and "inadmissible" evidence, gives the court of appeals good reason to conclude that a second trial is justified.[5]

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[5] Petitioner argues that, at the very least, every plaintiff in his position "should be allowed to show the district court why a new trial, without the excised testimony, is justified, before judgment is summarily entered against him." Pet. Br. 20. As we demonstrate, *infra*, pp. 12-19, the appellate court has broad discretion to decide between JAML, a new trial, or a remand to examine the new trial issue. Where, as here, the plaintiff offers the court of appeals *no ground to support a retrial*, there is no issue justifying a remand to the district court.

B. Governing Legislation, Procedural Rules, And Decisions Of This Court Confirm The Authority Of Courts Of Appeals To Direct Judgment As A Matter Of Law.

The Federal Rules of Civil Procedure must "be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. This mandate "reflects the spirit in which the rules were conceived and written, and in which they should be, and by and large have been, interpreted." 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (1987). To allow retrial as a matter of course when a plaintiff fails to muster admissible expert testimony runs afoul of this directive. Affording an appellate court discretion to order JAML and dispose of the case satisfies both the policy and plain language of the governing statute and implementing rules.

1. *The controlling statute and rules confer authority on appellate courts to dispose of insufficient claims.*

"The Court of Appeals must look to the statute defining its appellate power, 28 U.S.C. § 2106, for guidance as to the kind of order which it may direct the District Court to enter." *Bryan* v. *United States*, 338 U.S. 552, 559 (1950), overruled on other grounds, *Burks* v. *United States*, 437 U.S. 1 (1978). Under the plain language of that section, an appellate court's discretion is broad:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

When reversing a trial court's denial of JAML, this "statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal." *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967). To be sure, an appellate court does have two other options: it may remand for a new trial or remand to the district court to make the retrial determination. *E.g.*, 9A WRIGHT & MILLER, *supra*, § 2540 (1995); *Scott*, 101 F.3d at 760. But this is a matter vested in the sound *discretion* of the court of appeals. See *Morgan Guaranty Trust Co.* v. *Martin*, 466 F.2d 593, 600 (7th Cir. 1972) (§ 2106 "grants this court 'broad discretion in the disposition of a case on appeal'"); *Connecticut* v. *Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982) ("Ordinarily, it is within the broad remedial authority of an appellate court to reverse an erroneous decision of a lower court and to order that appropriate relief be awarded").

The Federal Rules of Civil Procedure confirm the power of the appellate court to decide that judgment should be directed for an appellant whose JAML motion was wrongfully denied. Rule 50(d) states that "[i]f the appellate court reverses the [denial of JAML] nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

There would be no need to recite that the grant of a new trial or the referral of that question to the court below is *permissible* if a third potential resolution—directing judgment—were foreclosed. In the event of reversal, if the appellee has neglected to demonstrate that further litigation is necessary, and the appellate court finds no such necessity, entry of judgment is the only alternative available.

This is evident from the 1963 advisory committee notes, which describe the traditional practice of federal courts of appeals. The notes indicate that, absent any basis for a retrial, the appellate court may "direc[t] entry of judgment." Fed. R. Civ. P. 50 advisory committee notes (1963). The leading treatises agree. As Professor Moore has observed, "[j]udgment may be entered even when the issue on appeal is the sufficiency of the evidence, especially when the appellee suggests no grounds for a new trial either on appeal or on petition for rehearing." 9 MOORE'S FEDERAL PRACTICE § 50.09[3][b] (1999). See also 9A WRIGHT & MILLER, *supra*, § 2540 ("It now is settled that if the motion for judgment as a matter of law erroneously is denied by the district court, the appellate court has the power to order the entry of judgment for the moving party").

This imposes no hardship because Rule 50 is structured so as to protect the plaintiff's interests. A sufficiently specific motion for judgment must be made at the close of the plaintiff's case and at the close of all the evidence, if it is to be renewed after a jury verdict has been rendered. Fed. R. Civ. P. 50(a)(2),(b). This "avoid[s] making a trap" of the post verdict JAML; the plaintiff is able to cure any deficiencies in its proof that

it may have overlooked prior to submission of its case to the jury. *Greenwood* v. *Societe Francaise*, 111 F.3d 1239, 1244 n.6 (5th Cir. 1997). Certainly, after *Daubert*, all parties are on notice of the standards their expert testimony has to meet to survive judgment. The case law defining what kind of expert testimony is admissible is now voluminous. Lawyers can be under no illusion today that expert testimony will escape vigorous challenge—or that they may withhold their "best case" for later submission.

The need to terminate litigation when it is evident that a plaintiff has not proven, or cannot prove, an essential element of his claim is a defining part of the overall architecture of the rules. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (summary disposition is "not * * * a disfavored procedural shortcut," but an "integral part" of the rules designed to secure a just, speedy, and inexpensive determination of every action). Judgment may be directed for the defendant in such a situation—either at the trial or appellate level—as long as the plaintiff has been alerted that an issue is potentially determinative and has been afforded the opportunity to produce evidence (if any exists) counseling against dismissal. Rule 50 itself embodies that overarching principle by requiring JAML during a jury trial if "a party has been fully heard" on a critical point and "there is no legally sufficient evidentiary basis * * * to find for that party." Fed. R. Civ. P. 50(a), (b).

The guaranteed "second bite" advocated by petitioner would subvert the aim of the federal rules to achieve the swift termination of legally insupportable claims. Moreover, to look only at the record as it existed at the

end of trial, regardless of the actual admissibility of the evidence, artificially confines an appellate court's Rule 50 inquiry. Courts of appeals should not be asked to ignore the reality that crucial portions of the record are inadmissible, and then to pretend that a reasoned assessment of the sufficiency of the evidence is possible. This invites bizarre rulings such as the Ninth Circuit made in *Schudel* v. *General Elec. Co.*, 120 F.3d 991, 995 (9th Cir. 1997). There the court first found that expert testimony, which was plaintiffs' *only proof* of causation of injury, did not meet the *Daubert* standard and should have been excluded. But believing it was obligated to review all evidence admitted at trial, including the expert testimony, the court determined that this unreliable evidence was sufficient to support the jury verdict in favor of plaintiffs. *Id.* at 995-996. Such absurd results defy common sense and make a mockery of the Rule 50 scheme.[6]

2. *The authority of appellate courts to grant judgment as a matter of law is confirmed by this Court's precedents.*

For over fifty years, this Court has consistently held that it is within an appellate court's discretion, after reviewing the record, to dismiss insufficient claims as a

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[6] Even if, in the present context, inadmissible evidence were taken into account, as petitioner advocates (Br. 23, 27), it would make no difference to the outcome. Where, as here, expert testimony is stricken as "speculative" and "unreliable," it cannot be sufficient to sustain a jury verdict. It would be illogical to conclude that testimony ruled inadmissible under *Daubert* on those grounds is *more supportive* of a plaintiff's claim than expert testimony that may be admissible under *Daubert* but is legally insufficient.

matter of law. Building on the analysis laid out in the seminal case of *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), this Court's decisions in the context of both summary judgment and JAML rulings have clearly established the propriety of the Eighth Circuit's direction of judgment for Marley. If the plaintiff had a fair opportunity to introduce evidence that sustains his cause of action at the first trial and fails to do so, he should not be permitted to waste additional resources in a second trial.[7]

In *Neely*, the Court set forth the procedure that courts of appeals should follow under Rule 50(d) when a trial court has erred in denying post-verdict JAML. The Tenth Circuit had found that the plaintiff's evidence at trial was insufficient to go to the jury on the elements of negligence and proximate cause and ordered judgment for the defendant. In affirming, this Court flatly rejected the argument that courts of appeals have a "total lack of power" to direct entry of judgment where the evidence is inadequate to support a jury verdict. 386 U.S. at 330. Noting the statutory grant of broad appellate jurisdiction under 28 U.S.C. § 2106, the Court held that "Rule 50(d) is permissive in the nature of its direction to the court of appeals: * * * there is nothing in Rule 50(d) indicating

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[7] *Neely* was not a revolutionary opinion. This Court had previously approved direction of judgment at the appellate level. See *Pence* v. *United States*, 316 U.S. 332, 340 (1942) (affirming appellate court's entry of judgment for the defendant because the record "overwhelming[ly]" supported the affirmative defense of fraud); *New York, N.H.&H.R.R.* v. *Henagan*, 364 U.S. 441, 442 (1960) (per curiam) (ordering entry of JAML for the defendant after examining the trial record and finding plaintiff's proof of negligence inadequate to send to the jury).

that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Id.* at 324.

This Court's decision in *Neely* rested on considerations of judicial economy. The Court acknowledged the importance of protecting the rights of plaintiffs whose new trial issues might be better addressed to the district judge, but was not persuaded that those concerns justified a "rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to *speed litigation and avoid unnecessary retrials*." 386 U.S. at 326 (emphasis added).

Based upon that consideration, this Court determined that a "discriminating approach" should be taken when reversing the denial of a post-verdict JAML. *Ibid.* After an examination of the evidence, the court of appeals has discretion to decide whether to order dismissal of the action or a new trial. *Id.* at 327. The question need not be "remanded" to the district court. If the evidence is challenged as insufficient to support the verdict, the appeal raises "issues of law with which the courts of appeals regularly and characteristically must deal." *Ibid.* The district court has "no special advantage or competence in dealing with them." If the appellee does proffer a ground for a new trial, the appellate court is well situated to "make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329.

After dispelling the notion that, given its familiarity with the case, the trial court is better equipped to decide

between JAML and a new trial, *Neely* explained that a plaintiff who neglects to raise new trial issues before the court of appeals has *waived* them. *Id.* at 329-330. The onus is on the plaintiff throughout the course of the litigation to guard against waiver by specifically urging grounds for a new trial. The plaintiff has numerous opportunities to make the requisite factual demonstration:

> [H]e may bring his grounds for a new trial to the trial judge's attention when defendant first makes an n.o.v. motion, he may argue this question in his brief to the court of appeals, or he may in suitable situations seek rehearing from the court of appeals after his judgment has been reversed.

Id. at 328-329. The petitioner in *Neely* did *none* of these things but instead stated in her appellate brief that the "'lawsuit was fairly tried and the jury was properly instructed.'" *Id.* at 329. The *Neely* opinion therefore refused to address a proffered ground for a new trial presented, for the first time, in petitioner's merits brief in this Court. *Id.* at 330.[8]

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[8] Contrary to petitioner's suggestion (Br. 22), *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967) (per curiam), reaffirmed *Neely*. *Iacurci* remanded a case to the district court because the jury's failure to respond to four out of five special interrogatories left "unresolved issues of negligence" and because the plaintiff timely asserted trial errors in the court of appeals. *Id.* at 88. Justice Harlan concluded in dissent that even in those circumstances, "this Court should overturn a considered judgment of a court of appeals on such issues only in situations of manifest abuse of discretion." *Id.* at 89. The majority disagreed with Justice Harlan not on that legal principle, but on its application to an unusual factual record.

Some twenty years later, this Court expanded on the role of judgment as a matter of law in civil litigation. In *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), the Court held that the Rule 56 standard mirrors the standard for JAML under Rule 50—*i.e,* "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof"—and stressed that the federal rules must be interpreted so as to fairly and expeditiously resolve suits and bring an end to legally insupportable claims. *Id.* at 323. Consistent with that goal, if the plaintiff has had adequate warning that he must come forward with his best evidence and loses on summary adjudication, he will have no further opportunities to advance triable evidence or undertake more discovery. *Id.* at 326. Because litigation can be conclusively terminated in this manner at the *pretrial* stage, it follows *a fortiori* that a plaintiff who fails to make out his claims after a *full trial* should receive equivalent treatment.

This Court's decisions in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), are to the same effect. *Matsushita* ruled that where a proffered expert study was "implausible and inconsistent with record evidence," the plaintiff could not survive summary judgment. 475 U.S. at 594 n.19. Building on *Matsushita* and *Celotex*, *Brooke Group* held that "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot

support a jury's verdict." 509 U.S. at 242. *Brooke Group* required entry of JAML where the expert's opinion was contradicted by the facts and thus could not justify the jury's verdict that an antitrust violation had occurred. If expert opinions cannot sustain a verdict because they are weak, unpersuasive, or inadmissible under *Daubert* (as in the instant case), entry of judgment for the defendant is not only warranted, but required.

Other decisions of this Court teach the same lesson. As *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988), explains:

> If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated [legal standard], judgment [can] properly be entered for respondent at once, without a new trial.

Boyle rejected plaintiff's argument that he was entitled to a retrial because the formulation of the military contractor defense ultimately adopted by the court of appeals differed from the instructions given by the district court to the jury. In reaching the same result in *United States* v. *Generes*, 405 U.S. 93 (1972), this Court squarely rejected Justice White's assertion that because the plaintiff *might* be able to produce enough evidence under the correct legal standard to create a jury question, the retrial issue should be referred to the district court. *Id.* at 112-113 (White, J., concurring in part). There was simply no cause for a new trial because "nothing [in the record] would support a jury verdict in [the plaintiff's] favor had the [correct] standard been embodied in the [jury] instructions." *Id.* at 106. Accord *Consolidated Rail Corp.* v. *Gottschall*, 512 U.S. 532, 558 (1994)

(remanding with instruction to enter judgment for defendant because, notwithstanding expert medical testimony, plaintiff's case "plainly [did] not fall" within the Court's definition of negligent infliction of emotional distress under FELA).

The principle exemplified in these precedents is clear: if the plaintiff failed to offer admissible evidence that was sufficient to sustain a verdict in his favor, a new trial is not warranted. Only if the plaintiff was precluded from averting that failure—for example, by the trial court's instructional error or manifestly erroneous exclusion of other evidence that would have strengthened the plaintiff's case—would a new trial be appropriate. See *Neely*, 386 U.S. at 327. A plaintiff, who bears the burden of proof, is *not* entitled to a new trial simply to obtain a second chance to muster a legally sufficient case: "a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 897 (1990).

3. *The Eighth Circuit's decision comports with this Court's precedents.*

Because petitioner had every opportunity and incentive to adduce the type of proof necessary to support his claims but failed in that endeavor, a direction of judgment against him was required. During the two years before petitioner's case came to trial, there was an extensive period of discovery,[9] with preclusive orders

[9] The deadline for fact discovery was extended to December 31, 1996, after initially being set for October 1, 1996. See Order (Oct. 1, 1996; Klein, M.J.) (Docket entry no. 16); Scheduling/Discovery Plan (Oct. 31, 1995; Klein, M.J.) (Docket entry no. 8) (hereinafter "Scheduling Order").

entered to resolve the litigation efficiently. Both parties were notified that they must "identify expert witnesses and the subject matter of their proposed testimony" by prescribed dates and, soon thereafter, "provide complete reports." Scheduling Order ¶¶ 3-4. A final pretrial order specified the evidence that could be presented at trial, including all experts who would, or might, be called. J.A. 66. The district court thus did everything possible to advise petitioner of preclusive deadlines for marshaling his proof and preparing for trial.

Petitioner had ample notice that there were potential flaws in his case and ample time to rectify them. Both because of his counsel's familiarity with *Daubert* and the numerous challenges brought against his experts, he was well aware of the admissibility hurdles he needed to clear. In its motion *in limine* and again in its multiple motions for JAML, Marley charged that petitioner's expert opinions were "untested and speculative." J.A. 75, 123; C.A. App. 109, 111, 294. Despite these challenges, petitioner did not attempt to muster additional expert support to bolster his theory that Marley's product was defective. In fact, petitioner *voluntarily* chose not to put on one of the experts disclosed in the pretrial order. See Marley C.A. Br. 14.

Given this record, the Eighth Circuit was more than justified in exercising its discretion to order JAML instead of a new trial in what it described as "not a close case." As this Court has invariably done, the Eighth

Circuit simply refused to ignore the infirmities in petitioner's critical expert testimony and speculate about what type of case he *might* be able to assemble were he permitted to try the case again. Pet. App. A-5 to A-6 & n.2 (rejecting any contention that a new trial was required "because [the] failure to do so would deny the plaintiffs the opportunity to reopen discovery and identify additional witnesses who might testify to their theory of liability"). That fact-bound and discretionary ruling is entitled to deference in this Court. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990) (where "discretion" is vested in a lower court, review is "deferential").[10]

Until his present brief in this court, petitioner himself agreed with the Eighth Circuit's finding of "fairness." He neglected to dispute that assessment or to make any factual argument that a retrial was warranted due to erroneous rulings, surprise, preclusion, or unfair reliance at trial. To preserve his right to pursue a new trial, petitioner should have conditionally asked the district court for retrial in the event his expert evidence was deemed invalid after the verdict. And, on appeal, "in the course of arguing for his verdict [he

[10] In *Neely*, this Court was willing to *assume* that the court of appeals "consider[ed] the new trial question in the light of its own experience with the case." 386 U.S. at 329-330. By contrast, the Eighth Circuit's opinion here demonstrates affirmatively that it diligently performed its duty of review, examining the entire record for unfairness. Pet. App. A-16. *Neely* thus provides *a fortiori* authority for affirmance here.

should have] indicate[d] why he [would be] entitled to a new trial should his judgment be set aside." *Neely*, 386 U.S. at 328. But petitioner did exactly the opposite. He reiterated several times in his trial and appellate briefs that the district court accurately instructed the jury (C.A. App. 357; Pet. C.A. Br. 43, 49) and "did not commit prejudicial error" (C.A. App. 360, 354). See also Pet. C.A. Br. 50 (requesting that "the Court affirm the District Court in all respects"). Even in his petitions for rehearing and certiorari, he merely cited Judge Lay's opinion in *Midcontinent*, along with similar decisions, and asserted mechanically that retrial was required, without offering any showing that he was deprived of a fair trial. J.A. 146-147; Pet. 10-11.

Just as in *Neely*, petitioner's omissions and concessions are fatal. He has waived his right to raise new trial issues and cannot now impeach the Eighth Circuit's determination of fairness with arguments he has not previously advanced. See *Neely*, 386 U.S. at 329; see also *Ohio Forestry Ass'n* v. *Sierra Club*, 118 S. Ct. 1665, 1672-1673 (1998) (raising argument for the first time in a Supreme Court merits brief is "legally fatal").

Finally, even if timely raised, petitioner's current, generalized complaint that he would have "tried [the case] differently" if his expert opinions had been excluded at trial still would not justify retrial. Pet. Br. 25. Commentators agree that a court of appeals should direct entry of judgment for the defendant unless the plaintiff makes a precise showing that there is additional, available evidence that would change the result and which was not introduced at trial due to "excusable" neglect. Martin B. Louis, *Post Verdict Rulings on the Sufficiency*

of the Evidence: Neely v. Martin K. Eby Construction Co. Revisited, 1975 Wis. L. Rev. 503, 518 (1976). See also *MacEdward* v. *Northern Elec. Co.*, 595 F.2d 105, 114-115 (2d Cir. 1979) (Waterman, J., dissenting) (direction of a new trial is rare and appears to be limited to situations where the appellee demonstrates an excusable, curable gap in its evidence or that it was handicapped in developing its case); *Safeway Stores* v. *Fannan*, 308 F.2d 94, 99 (9th Cir. 1962) (counsel for plaintiff made no suggestion "that he was surprised (in a legal sense, as distinguished from the usual 'surprise' of a losing counsel), or of any other reason why the matter should not have followed the normal course to a judgment on the merits").

II. GUARANTEED RETRIAL IN COMPLEX CASES WOULD CREATE PERVERSE INCENTIVES AND WASTE JUDICIAL RESOURCES.

Efficient termination of meritless claims is an increasingly significant concern in complex and protracted litigation. Extended cases consume large amounts of time and money, imposing a heavy burden on the judiciary, the parties, and other litigants who are entitled to their day in court. Unless appellate courts retain discretion to grant JAML in those disputes due to evidentiary insufficiency, an unnecessary waste of judicial resources and further congestion of an already-overtaxed federal court system will result.

Petitioner's suit already has made a large claim on the resources of the federal courts. This case involved two years of pretrial proceedings and occupied eight trial days. The parties engaged in prolonged discovery and made countless motions. Petitioner alone tendered the

opinions of a "fire cause and origin" expert; a "fire investigator" and "technical forensic expert"; and a "metallurgist." Pet. App. A-8, A-11, A-13. Marley was required to respond with more expert testimony: a heater expert; three engineers knowledgeable about various component parts of the heater; and a chemical engineer. Marley C.A. Br. 20-24. Giving petitioner an opportunity to improve on his deficient presentation on retrial in such a protracted case would conflict with any reasonable concept of judicial economy.

Considering the large number of complex lawsuits currently pending, petitioner's automatic retrial rule would seriously undermine the goal of the Federal Rules to resolve "every action" in a "just," "speedy," and "inexpensive" manner. Fed. R. Civ. P. 1. Concord Boat's suit against Brunswick highlights the danger of permissive retrials, since "antitrust cases [are] among the most drawn out and expensive types of litigation." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989). More than two years passed before the claims were tried in the *Concord Boat* case, during which time exhaustive discovery culminated in the production of over a million documents. The parties took the depositions of dozens of witnesses, including proffered expert witnesses, and the trial lasted three months. An unnecessary retrial in such a case would impose a serious burden on the district court and the parties. As the Second Circuit has incisively stated, judgment as a matter of law is "an important procedural device in antitrust cases, because it enables courts to efficiently resolve potentially costly and time-consuming litigation which can chill competitive forces." *Clorox*

Co. v. *Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997).[11]

Ordering retrial where expert testimony is inadmissible would erode the salutary incentive to offer a litigant's best case the first time around. The risks associated with using a dubious expert theory would effectively be canceled out. The *Concord Boat* case is again illustrative. A preclusion order instructed the parties in that case to disclose and memorialize their expert opinions by a specified date.[12] Plaintiffs settled on Dr. Hall, whose proffered opinion (that the jury *must* find Brunswick liable and award damages *simply because* it had a market share above 50%) was unprecedented in antitrust litigation. Because plaintiffs were represented by sophisticated antitrust counsel and faced motions *in limine*, they were well aware that Hall's opinion would be vigorously attacked under *Daubert* and might not survive such a challenge. Nonetheless, they made the deliberate tactical choice to retain him as their sole expert witness—and to gain the *in terrorem* effect on settlement evaluations that was imposed by Hall's unprecedented theory. If plaintiffs were awarded a new trial, despite the insufficiency of Hall's testimony, they

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[11] Combined with the treble damage penalty, the free availability of new trials in antitrust cases also would threaten to become a tool of coercion. Plaintiffs could impose large costs and economic risks on their adversaries, with the assurance that if they failed in their expert proof, they could start the litigation process all over again and compel their opponent to accept an exorbitant settlement.

[12] The order stated that "failure to include subjects in the initial or supplemental [expert] reports shall preclude use of such testimony at trial, except in extraordinary circumstances."

would be rewarded for offering this defective evidence. However, if the result were entry of JAML, litigants would be motivated to assemble their best evidence at the first trial. The risk of JAML on appeal encourages presentation of sound expert evidence without discouraging the submission of "well-grounded but innovative" theories. *Daubert*, 509 U.S. at 593. A novel expert opinion may be buttressed with additional testimony to guard against entry of judgment. And any cumulation of evidence would represent only a small fraction of the cost of retrying the entire case.

Automatic retrials would largely nullify the conscientious efforts trial judges make to focus and expedite complex cases. Administration of a complex case in the early stages of litigation aims to encourage "earlier dispositions, less wasteful activity, shorter trials, and * * * economies of judicial time and a lessening of judicial burdens." More specifically, "[m]anagement of the disclosure and discovery of expert opinions is * * * essential to ensure adequate preparation by the parties, avoid surprise at trial, and facilitate rulings on the admissibility of expert evidence." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION THIRD 10, 97 (1995). Mandatory retrials—which override preclusive pretrial orders on the speculative premise that the plaintiff "might" muster a "better case" in a second trial—undermine the intent of case management and the orderly pretrial process to achieve "a just resolution as speedily and inexpensively as possible." *Id.* at 10.

"The number of cases brought to the federal courts is one of the most serious problems facing them today." Chief Justice Rehnquist, *The 1998 Year-End Report of*

the Federal Judiciary, *The Third Branch* (Administrative Office of the U.S. Courts, Jan. 1999). At a time when "very heavy caseloads with the pressure exerted by the Speedy Trial Act to take criminal cases out of order and try them first makes managing federal district courts' dockets trickier than ever before," it is difficult enough to provide litigants with a single fair trial. *Northern Ind. Pub. Serv. Co.* v. *Carbon Coal Co.*, 799 F.2d 265, 269 (7th Cir. 1986). Permitting retrial of claims to try to improve an initial defective trial presentation would increase that burden dramatically.

Automatic retrials are especially indefensible in complex suits, in which experienced counsel are well versed in the requirements of *Daubert* as well as general trial strategy. Litigants who have been competently represented and who have had every opportunity to present their best evidence should not be allowed to preempt the judicial calendar by conducting not just one extended trial, but two.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

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CHAD WEISGRAM, ET AL.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

injured plaintiffs in civil actions. Central to ATLA's mission is the preservation of the right to trial by jury, guaranteed by the Seventh Amendment in the Constitution of the United States as well as the constitutions of nearly every State.

This right was places in the Bill of Rights primarily as a guard against encroachment by judges on the historic role of the jury. ATLA is concerned that aggressive judicial "gatekeeping" with respect to the admissibility of evidence threatens to undermine the fundamental responsibility of the jury as factfinder.

In ATLA's view, judicial authority to overturn a jury's verdict and enter judgment for the opposing party carries grave potential danger to the right to trial by jury. For that reason, the exercise of that authority should be subjected to the closest scrutiny.

SUMMARY OF THE ARGUMENT

1. This case was submitted to the jury, which rendered its verdict for plaintiffs. This very fact limits the judicial authority to render judgment for the losing party. Fed. R. Civ. Pro. 50 permits courts to enter judgment as a matter of law or to order a new trial based upon errors at trial. However, the Rule does not address the unfairness to the verdict winner whose evidence was ruled admissible at trial and who faces the loss of the jury's verdict based on error in the trial judge's ruling.

Entry of judgment as a matter of law against the verdict winner at a time when the error cannot be cured is not in accordance with substantial justice. In this case, Petitioner was entitled to rely on the trial judge's ruling that expert testimony was sufficiently reliable. Entry of judgment as a matter of law, rather than new trial, deprives Petitioner of the opportunity to remedy the inadequacies found by the appellate court.

Nearly every other federal court of appeals has addressed the unfairness of this result in a straightforward manner. Those courts, including a prior decision by the Eighth Circuit, require judges considering motions for judgment as a matter of law following a verdict to examine all the evidence that went to the jury, including evidence later held inadmissible. The appropriate remedy for the erroneous admission of that evidence is an order for a new trial, not judgment.

The district court did not err in denying Morely's motion for judgment as a matter of law. Even if portions of the testimony of Weisgram's experts should not have been admitted, Marley was, at most, entitled to a new trial.

2. The court of appeals itself abused its discretion in ordering the district court to enter judgment as a matter of law instead of a new trial. The same considerations of reliance and fairness that require the trial court to consider all the evidence without excising inadmissible evidence apply with equal force to appellate courts considering motions for judgment as a matter of law.

Although Rule 50(d) permits a court on appeal to enter judgment as a matter of law, when the ground for reversal is a matter that is within the discretion of the trial court, the appellate court should remand for a new trial. The determination whether expert opinion is sufficiently reliable is a matter that is entrusted to the broad discretion of the judge at trial. Refusal to remand for a new trial in this case constituted an abuse of discretion.

3. The determination by the court of appeals that portions of the testimony of plaintiffs' experts were "suspect" and unreliable was clearly based on the court's own assessment of the credibility of the experts and the weight of their testimony.

The court's opinion is replete with criticisms of the expert's gathering and analyzing of data regarding the cause

of the fire without any effort to determine whether they met the level of intellectual rigor required in the field of fire investigation. Without such an objective standard, the court's reliability determination amounts to little more than an evaluation of weight and credibility. The Seventh Amendment commands that an adverse ruling by the appellate court on that basis must afford the party the option of a new trial.

ARGUMENT

Respondents repeatedly sound their theme in this case: "The case should not have gone to the jury, but did." Brief in Opp. at 5 & 12. But the case did go to the jury, and that makes a great deal of difference. The rules of civil procedure and "the influence -- if not the command -- of the Seventh Amendment, *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958), protect the verdict winner from reexamination of the jury findings and trial by appellate court.

I. THE COURT OF APPEALS ERRED IN REMANDING THIS CASE TO THE DISTRICT COURT FOR ENTRY OF JUDGMENT AS A MATTER OF LAW, RATHER THAN FOR A NEW TRIAL

A. The District Court Correctly Denied Judgment As a Matter of Law Regardless of the Inadmissibility of Some Expert Testimony

The majority of the Eighth Circuit Court of Appeals determined that "portions of the testimony from three of plaintiffs' witnesses were unreliable," citing this Court's decision in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and that the District Court "abused its admittedly broad discretion in allowing the suspect testimony." *Weisgram v. Marley Co.*, 169 F.3d 514, 517-18 (8th Cir. 1999). Determining further that without the inadmissible testimony plaintiff's case was insufficient to go to the jury,

the court ruled that the trial judge erred in denying Marley's motion for judgment as a matter of law. *Id.* at 522. The court directed the District Court to enter judgment as a matter of law for Marley, pointedly rejecting any suggestion that it remand the case for a new trial. *Id.* at 522& 517 n.2.

Following a jury verdict, Fed. R. Civ. Pro. 50(c) affords the trial judge the options of allowing the judgment to stand, entering judgment for the verdict loser, or ordering a new trial. The rule does not expressly address the problem that after trial, and certainly on appeal, it is too late to fix errors that could have been cured during trial but for the trial court's ruling. By choosing the option of ordering a new trial, the district court or court of appeals can assure that the rule is applied in accordance with substantial justice.

The potential for unfairness in the entry of JAML rather than a new trial is readily apparent in this case. Plaintiffs presented three experts whose testimony gave a fairly complete picture for the jury of how the Weisgram fire started. Fire captain Dan Freeman, who had helped put out the blaze and who was also a certified and experienced fire investigator, described the physical evidence at the scene which, he stated, pointed to the baseboard heater as the source of the fire. He also explained that the physical evidence was not consistent with the theory that a cigarette had been dropped into the couch. He testified he did not know why the heater malfunctioned. "That's why I sent it to Mr. Dolence." Trial Tr. of May 20, 1997 (testimony of Dan E. Freeman) at 64.

Ralph Dolence, a fire investigator and master electrician with experience investigating fires in household appliances, stated, based on examination of the heater and consultation with Freeman, that the thermostat had malfunctioned and the high limit switch did not shut off the heater as intended. However, he stated, he did not know why the thermostat and switch malfunctioned. Trial Tr. of May 21, 1997 (testimony of Ralph Dolence), at 126-28.

For this reason, the heater was examined by a metallurgist, Sandy Lazarowicz. He testified that serrations on the thermostat contacts caused arcing that eventually caused them to weld together allowing the heater to reach a temperature sufficient to ignite nearby combustibles. 169 F.3d at 521.

The district court overruled Morely's objections to the experts' testimony at trial and denied its post-verdict motions. The judge specifically found the proffered testimony reliable as well as relevant as required under *Daubert. Weisgram v. Marley Co.*, No. A3-95-103 (D.N.D., Sept. 4, 1997) at 5-8.

The court of appeals, however, applied a far more restrictive standard of reliability than the trial judge, characterizing portions of the experts' opinions as inadmissible "speculation." The court concluded that, under North Dakota law of strict liability, without the expert opinions it found inadmissible, "the heater cannot be proven to have been defective when Marley sold it [so] there was not sufficient evidence for the jury to find for plaintiff." 169 F.3d at 522. The court ruled that "Marley is entitled to judgment as a matter of law on plaintiffs' claims." *Id.* at 517.

Entry of judgment as a matter of law after the jury's verdict prejudices Weisgram in manner described earlier: It is too late to cure the error. Prior to submission of the case to the jury, plaintiffs could have attempted to obtain additional or differently qualified experts. They may have relied on a different manner of proving liability.

Nearly every U.S. court of appeals that has looked at the unfairness of this result has adopted a fairly straightforward means of assuring substantial justice: In ruling on a post-verdict motion for judgment as a matter of law, the court must consider all the evidence before the jury, including evidence later found to be inadmissible. The Eighth Circuit itself has adopted this position and explained its

rationale:

> The subsequent ruling [to exclude admitted evidence], after the verdict, . . . placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such [evidence] was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

Midcontinent Broadcasting Co. v. North Central Airlines, 471 F.2d 357, 359 (8th Cir. 1973). The Eighth Circuit made clear that entering judgment on the basis of a record "altered" by the excision of inadmissible evidence was error.

> Although the trial court found insufficient evidence to sustain the verdict, it did so only after excluding plaintiff's expert testimony which had been presented to the jury. This was error. In ruling on the sufficiency of evidence the trial court must take the record as presented to the jury and cannot enter judgment on a record altered by the elimination of incompetent evidence.

Id. at 358.

The Ninth Circuit has adopted the same position, supported by the same persuasive considerations of fairness to the verdict winner:

> [W]when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial closed. This rule promotes certainty: litigants need not supplement conditionally admitted evidence, perhaps unnecessarily; and district courts need not speculate as to what other evidence might have been offered if the evidence had been excluded at trial. The rule promotes fairness: punishing a litigant for the court's erroneous admission of evidence is unfair; and the remedy of a new trial is available to put both sides on an equal footing.

Schudel v. General Electric Co., 120 F.3d 991, 995 (9th Cir. 1997), cert. denied, 118 S.Ct. 1560 (1998).

In fact, nearly every other U.S. court of appeals that has considered this issue has arrived at a similar position. See, e.g., *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1189 (4th Cir. 1990)(plaintiff had relied upon expert testimony that the trial judge had ruled admissible and was "clearly prejudiced" by entry of jnov because "fairness requires that Persinger have an opportunity to supply additional evidence of negligence."); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343- 44 (6th Cir. 1992); *Jackson v. Pleasant Grove Health Care Ctr.*, 980 F.2d 692, 695-96 (11th Cir. 1993); *see also* 21 Charles A. Wright and Kenneth A. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE § 5041, at 228-29 (1977) ("The judge cannot grant a directed verdict or judgment notwithstanding the verdict by ignoring evidence he has admitted on the ground that the admission was error.")

The sole contrary decision, *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) relies on "the homespun axioms that a litigant is entitled to only one bite of the apple or to only three strikes at bat." *Id.* at 1199. ATLA suggests that plaintiffs here do not seek extra strikes; they hit their home run with the jury, but it has been called back. It is Marley that obtained a second bite at the apple in the form of reexamination by the court of appeals of the jury's factual findings in violation of the Seventh Amendment.

It is true that the rules should minimize the unnecessary new trials. The approach espoused by the lower court in this case, however, would result in far greater waste. It requires that litigants prepare and proffer an overabundance of expert opinion and other evidence on factual issues so as not to lose the verdict -- not to an unconvinced jury, but to a disbelieving appellate court. Even that profligate strategy would likely fail in the face of a ruling by the trial judge that

the party's additional evidence was excludable as cumulative under Fed. R. Evid. 403.

The trial judge did not err in denying Marley's motion for judgment. Even if the expert testimony relating to the defect in the heater was admitted in error, the remedy following the jury's verdict was, at best, a new trial. The appellate court's order to enter judgment for Marley should therefore be reversed.

B. The Lower Court's Failure to Remand for New Trial Constituted Abuse of Discretion

The court of appeals, stated that, although Rule 50(d) permits the court to remand for a new trial, "we can discern no reason to give the plaintiffs a second chance to make out a case of strict liability." [517 n.2] With due respect, ATLA suggests that reasons for such a remand were readily apparent and that the court's refusal to do so amounted to an abuse of discretion.

1. Appellate courts, like trial courts, should consider all the evidence, including inadmissible evidence, in considering a motion for judgment as a matter of law.

As noted earlier, the prevailing rule among the federal circuits requires that district courts passing on motions for JAML consider all the evidence in the case in the light most favorable to the verdict winner, including evidence the court has ruled inadmissible. The rationale for the rule -- fairness to the party who has relied upon the court's evidentiary rulings -- is equally compelling when appellate courts consider motions for JAML.

The Tenth Circuit held precisely that in *Kinser v. Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), a product liability action. The manufacturer argued to the appellate court that it was entitled to JAML because the testimony of plaintiffs' experts was inadmissible under *Daubert*. The court disagreed, stating that, even if the experts should not have been permitted to testify, appellant's remedy "is, at best, a

new trial." The court explained that "[l]ike the district court, we must evaluate the Rule 50(b) motion by looking at all evidence admitted at trial, even that which was admitted in error." On appeal, as in the district court, the rule promotes certainty and fairness. *Id.* At 1269.

The Eighth Circuit's decision to take away the verdict rendered by the jury in plaintiff's favor is plainly inconsistent with substantial justice. The majority opinion disparagingly suggests that new trial would "give the plaintiffs a second chance" after they "had a fair opportunity to prove their claim and they failed to do so." 169 F.3d 517 n.2. On the contrary, that option would preserve plaintiff's right to a jury trial after having successfully proved their claim to a jury in reliance on the trial judge's evidentiary rulings.

2. Appellate courts should remand for a new trial determination where reversal is based on matters entrusted to the discretion of the trial judge.

This Court has held that, although Fed. R. Civ. Pro. 50(d) does not explicitly so provide, "there is nothing in Rule 50(d) indicating that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Neely v. Martin K. Eby Const. Co.*, 386 U.S 317, 324 (1967).[2]

However, the Court cautioned, "where the court of appeals sets aside the jury's verdict because the evidence was

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2 **Denial of Motion for Judgment as a Matter of Law.**

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Fed. R. Civ. Pro. 50(d).

insufficient to send the case to the jury, it is not so clear that the litigation should be terminated." 386 U.S. at 327.

> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues -- because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

Id at 325.

Hence, the Court concluded, "the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329. Significantly, the Advisory Committee's Note to Rule 50(d) suggests that "remanding the case for a determination by the trial court as to whether a new trial should be granted. . . . is advisable where the grounds urged are suitable for the exercise of trial court discretion."

In this case, the court's decision to reverse was based entirely on the determination of whether testimony by plaintiffs' experts was reliable as well as relevant under this Court's decision in *Daubert*. That determination, this Court has repeatedly emphasized is entrusted to the broad discretion of the trial judge. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 1176 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997). In these circumstances, the argument in favor of remanding for a new trial, rather than entry of judgment, was especially strong. The court's failure to do so amounted to an abuse of its own discretion.

II. THE COURT'S ORDER OF JUDGMENT AS A MATTER OF LAW VIOLATED THE SEVENTH AMENDMENT PROHIBITION AGAINST REEXAMINATION OF JURY FINDINGS

The Seventh Amendment commands that in suits at common law, the right of trial by jury shall be preserved.[3] Its purpose is preservation of "the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935).

Justice Black, shortly after the Rules of Civil Procedure became effective, perceived that vigilant review of judicial decisions that evidence is insufficient as a matter of law would be critical to protecting the jury right:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issued in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

Galloway v. United States, 319 U.S. 372, 407 (1943)(Black, J., dissenting). The price of the lack of vigilance may well be "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore,*

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3 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST., amend VII.

439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway,* 319 U.S. at 397.

For these reasons, this Court has been highly protective of the jury's role:

> Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). *See also McKnight v. Johnson Controls, Inc.*, 36 F.3d 1196, 1200 (8th Cir. 1994) (on motion under Rule 50 for judgment as a matter of law, courts "must not engage in a weighing or evaluation of the evidence or consider questions of credibility" in determining that no reasonable inference can sustain the verdict).

In this case, the majority of the court of appeals clearly based its decision on an assessment of the weight and credibility of the opinions of plaintiffs' experts. The court's opinion is replete with disparagements of the fire investigators' methods and conclusions. The court suggests Captain Freeman did not gather a sufficient number of physical samples and photographs from the scene. at 169 F.3d at 519. The court also finds reason for skepticism in the fact that Dolence did not visit the Weisgram house, that he consulted with Freeman, the fire investigator on the scene, and did not test his theory on the burned heater. *Id.* at 519-20.

The court, however, made no inquiry into whether the investigators' methods were of the type "generally accepted in the relevant [fire investigating] community." *Kumho Tire,* 119 S. Ct. at 1176. The objective of the *Daubert* standard

> is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of

> intellectual rigor that characterizes the practice of an expert in the relevant field.

Id. Without that objective basis for comparison, the court's conclusion that the investigators' testimony was speculative or unreliable amounted to little more than the court's own lay opinion of the witnesses' credibility. Merely to recite this Court's conclusion in another case that there "is simply too great an analytical gap between the data and the opinion proffered." 169 F.3d at 521, quoting *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), cannot substitute for at least some inquiry into whether the level of inference the experts employed to bridge that gap was acceptable within the field of their own expertise.

The jury was surely entitled to credit the testimony of the Freeman, who arrived to put out the fire and began his investigation literally while the trail was literally still warm and who was not compensated by plaintiffs for his testimony. The jury was equally entitled to discredit the opinion of Morely's paid experts, whose "discarded cigarette" theory was inconsistent with the physical evidence in the case. Those credibility determinations were properly for the jury.

Court's reexamination of the jury's verdict on appeal constituted, at best, a review of the weight of the evidence. Plaintiffs essentially occupied the same position as petitioner in *Hetzel v. Prince William County*, 523 U.S. 208, 118 S. Ct. 1210 (1998), whose jury award of damages was determined by the court of appeals to be not supported by the evidence. This Court unanimously held that the appellate court's entry of judgment for a lower amount without affording her the option of a new trial, violated the Seventh Amendment. ATLA suggests that the Seventh Amendment commands no less in this case.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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